Supreme Court, U.S.
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No. ——

In The

# Supreme Court of the United States

October Term, 1997

CAROLINE RUSSELL, JAMES ADAMS
AND GERALD JEFFORDS,

*Petitioners,*

v.

THOMAS WILKINSON, AND BENJAMIN WILKINSON
AND JONATHAN WEIGAND, MINORS,
BY AND THROUGH THEIR GUARDIAN
THOMAS WILKINSON,

*Respondents.*

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals has jurisdiction under 28 U.S.C. § 1291 to hear an immediate appeal by three state child protective services social workers from an unfavorable qualified-immunity ruling made on a motion for summary judgment where the state officials are only asserting the abstract issue of law as to whether the familial rights asserted by the plaintiffs were "clearly established", and where the ruling to deny their appeal undermines their ability to perform the extremely important governmental function of investigating reports of suspected child abuse.

## LIST OF PARTIES

The parties to the proceedings are Petitioners Caroline Russell, James Adams and Gerald Jeffords, and Respondents Thomas Wilkinson, Benjamin Wilkinson, a minor, and Jonathan Weigand, a minor, by and through Thomas Wilkinson.

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## PETITION FOR WRIT OF CERTIORARI

Caroline Russell, James Adams and Gerald Jeffords respectfully petition for a writ of certiorari to review the order of the United States Court of Appeals for the Second Circuit.

## OPINIONS BELOW

The orders of the Court of Appeals, dismissing the Petitioners' appeal, entered on October 7, 1997, and denying the Petitioners' motion for rehearing, entered on October 28, 1997, are unreported and are reprinted on pages 1 and 51 of the Appendix.

The first opinion and order of the District Court, entered on April 17, 1995, is reported at 885 F.Supp. 651 (D. Vt. 1995), and is reprinted on pages 17-50 of the Appendix; the second opinion and order of the District Court, entered on July 31, 1997, is unreported and is reprinted on pages 2-16 of the Appendix.

## JURISDICTION

An order dismissing the Petitioners' appeal was entered on October 7, 1997. A motion for rehearing was denied on October 28, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Due Process Clause of the Fourteenth Amendment of the United States Constitution provides that:

> . . . ; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . .

2. 42 U.S.C. §1983 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

## STATEMENT OF THE CASE

This case involves an investigation by three state child protective services social workers of a report of suspected child abuse made to them in late January, 1993 by the mother of two minor children and the family's psychiatrist that the children had been abused by their father. After the investigation was completed, the social workers substantiated the report of suspected abuse against the father determining under state law that there was accurate and reliable information that would lead a reasonable person to believe that the children had been

abused. However, the children were never removed from their parents' home by the defendants and no state child protective services judicial proceedings were ever initiated by the defendants regarding them because the defendants believed that the children were being adequately protected by their mother. The defendants closed their investigation within three weeks of receiving the child abuse report.

The children's father took an administrative appeal of the defendants' decision to substantiate the report made against him. After an internal administrative review at which the father was represented by counsel, the defendants affirmed their decision to substantiate the report of suspected child abuse.

The father filed a federal civil rights and state tort action against the psychiatrist and the two state child protective services social workers in Vermont state court which was removed to the U.S. District Court for the District of Vermont on June 20, 1994.

On April 17, 1995, the district court denied the defendant social workers Russell and Adams' motion for summary judgment which was based on qualified immunity, and granted the plaintiffs' motion to amend their complaint to add a third social worker defendant (Jeffords) and to add new state and federal causes of action. (App. 36-50). The defendant social workers took an appeal to the U.S. Court of Appeals for the Second Circuit. On September 5, 1995, the U.S. Court of Appeals for the Second Circuit summarily dismissed defendants' appeal based on the defendants' claim that there were factual issues in dispute relating to qualified immunity. (App. 54-56).

After extensive discovery, defendant social workers Russell, Adams and Jeffords filed a renewed motion for summary judgment based on qualified immunity and on the merits of the plaintiffs' causes of action. In an Opinion and Order entered on July 31, 1997, the district court granted summary judgment for the social worker defendants with regard to the plaintiffs' claims of libel and slander, conspiracy, and negligence per se. In its order, the district court did not address the defendants' summary judgment motion with regard to the plaintiffs' negligence, federal deprivation of civil rights, federal denial of due process and infliction of emotional distress claims holding that "the Court has already ruled on the remaining counts". (App. 2). However, the negligence and federal denial of due process claims, which were newly amended counts, had not been previously ruled on by the district court. In addition, no claims involving newly added defendant social worker Jeffords had ever been previously ruled on by the district court. Accordingly, the only claims that had been previously ruled on by the district court were the plaintiffs' federal deprivation of civil rights and infliction of emotional distress claims.

On August 22, 1997, the three social worker defendants filed a notice of appeal with regard to the district court's opinion and order of July 31, 1997 (App. 57-58). On September 15, 1997, the plaintiffs filed a motion to dismiss the appeal (App. 59-65), and the defendants filed a memorandum in opposition thereto. (App. 66-69). On October 7, 1997, the Court of Appeals for the Second Circuit granted the plaintiff-appellees' motion to dismiss the appeal (App. 1). On October 15, 1997, the defendant-appellants filed a motion for rehearing (App. 70-76)

which was denied by the court of appeals on October 28, 1997. (App. 51).

In their opposition to the plaintiffs' motion to dismiss the appeal, and in their motion for rehearing, the defendants conceded and accepted for purposes of the appeal the facts as viewed by the plaintiffs and the district court. (App. 66-76). Thus, on appeal to the Second Circuit the only issue raised by the defendants was whether the rights allegedly infringed by the defendants and asserted by the plaintiffs were "clearly established" for the purposes of qualified immunity.

The social worker defendants now seek certiorari by this Court to review the orders of the court of appeals dismissing their appeal.

## REASONS FOR GRANTING THE WRIT OF CERTIORARI

The decision of the Court of Appeals for the Second Circuit warrants a review by this Court for two compelling reasons: 1) the order of the court of appeals dismissing the defendants' appeal is in direct conflict with the decisions of this Court and other courts of appeals on the important federal question governing qualified immunity under federal civil rights law for state child protective services officials; and 2) the decision of the court of appeals, and the underlying district court decisions, are so contrary to the decisions of the other courts of appeals and the Vermont Supreme Court on the important issue of child protective services social worker liability under federal law to call for an exercise of this Court's supervisory power.

## I.

**The Court of Appeals' Order Denying the Defendants Their Right to Appeal is in Direct Conflict with this Court's Decisions and the Decisions of Other Courts of Appeals**

In *Behrens v. Pelletier*, ___ U.S. ___, 116 S.Ct. 834, 842, 133 L.Ed. 2d 773, 787-788 (1996), this Court re-affirmed and held that summary judgment determinations which deny qualified immunity are appealable final orders when they resolve an abstract issue of law as to whether the federal right allegedly infringed was clearly established. In this case, the plaintiffs moved to dismiss the defendants' appeal on the grounds that the appeal was premature claiming that relevant factual issues exist. (App. 59-65). In response to the plaintiffs' motion, and in their motion for rehearing, the defendants expressly stated to the court of appeals that they were *only* asserting on appeal that their conduct, no matter how it is viewed by the plaintiffs did not, as a matter of law, violate clearly established law. The defendants expressly represented to the court of appeals on both occasions that they were *not* urging on appeal that there was insufficient evidence to raise a genuine issue of fact. Indeed, the defendants expressly argued that, even accepting the facts as the district court viewed them in its earlier Opinion and Order of April 17, 1995, and notwithstanding the plaintiffs' failure to dispute the defendants' contention in their summary judgment motion that no genuine issue of material fact existed in the case, the court of appeals had jurisdiction to decide the appeal under 28 U.S.C. §1291 as their appeal only raised questions of law. (App. 66-76).

The order of the court of appeals dismissing the defendants' appeal not only is in conflict with this Court's decisions in *Behrens*, but it is in direct conflict with the decisions of the courts of appeals in *Stem v. Ahearn*, 908 F.2d 1 (5th Cir. 1990); *Williams v. Pollard*, 44 F.3d 433 (6th Cir. 1995); *Manzano v. South Dakota Dept. of Social Servs.*, 60 F.3d 505 (8th Cir. 1995); *Myers v. Morris*, 810 F.2d 1457 (8th Cir. 1987), *cert. denied*, 484 U.S. 828, 108 S.Ct. 97, 98 L.Ed.2d 58 (1987); and *Foy v. Holston*, 94 F.3d 1528 (11th Cir. 1996). All of those cases involved appeals by state child protective services social workers whose motions for summary judgment based on qualified immunity had been denied by the district court but were considered to be appealable final orders and were then reversed by the courts of appeals in favor of the social worker defendants.

In this case the defendants respectfully submit that the extremely important judicial and public policy considerations, involving the distraction of officials from their governmental duties, the inhibition of discretionary action and the deterrence of able people from public service, that formed the basis for this Court's decision in *Harlow v. Fitzgerald*, 457 U.S. 800, 816-818, 102 S.Ct. 2727, 2737-2738, 73 L.Ed.2d 396 (1982) are most profoundly implicated in lawsuits filed against state child protective services social workers. By forcing these defendants to go to trial before the resolution of a purely immunity legal question, the court of appeals has not only denied them their right to appeal under 28 U.S.C. §1291, but in so doing has chilled their ability to carry out their grave and

unenviable responsibilities of investigating reports of suspected child abuse.

## II.

**The Court of Appeals' Order Dismissing the Defendants' Appeal, and the Underlying District Court Decisions, Are So Contrary to the Decisions of the Other Courts of Appeal And the Vermont Supreme Court as to Call for an Exercise of this Court's Supervisory Power**

By dismissing the defendants' appeal, and thus forcing the defendant child protective services social workers to go to trial, the court of appeals has departed from the rulings of the other circuit courts of appeals, its own precedent in this area, and the Vermont Supreme Court's interpretation of the controlling federal law.

In its Opinion and Order of April 17, 1995, the district court ruled that there was a clearly established federal constitutional right in familial relationships. (App. 43-44). This ruling, and the district court's refusal to reconsider it in its Opinion and Order of July 31, 1997, is directly contrary to the decisions in *Frazier v. Bailey*, 957 F.2d 920 (1st Cir. 1992); *Stem v. Ahearn*, 908 F.2d 1 (5th Cir. 1990); *Doe v. Louisiana*, 2 F.3d 1412 (5th Cir. 1993); *Manzano v. South Dakota Dept. of Social Services*, 60 F.3d 505 (8th Cir. 1995); *Thomason v. SCAN Volunteers Servs., Inc.*, 85 F.3d 1365 (8th Cir. 1996); and *Foy v. Holston*, 94 F.3d 1528 (11th Cir. 1996). Moreover, the district court's decisions were contrary to the Second Circuit's decision in *van Emerick v. Chemung County Dep't of Social Services*, 911 F.2d 863 (2nd Cir. 1990). Many of the above cases involved situations in which the subject children were

removed from their parents' homes, were taken into state custody, and situations in which state juvenile court custody proceedings were initiated subsequent to the child abuse investigation. The present case, however, only involves the conduct of the investigation of a report of suspected child abuse.

In addition, the district court's decision is directly contrary to the holding in the Vermont Supreme Court in the case of *Billado v. Appel*, ___ Vt. ___, 687 A.2d 84, 89 (Vt. 1996) wherein the Court, relying on its thorough review of federal case law, held that

> Almost without exception, courts have found such actions to be protected by qualified immunity because there is no controlling constitutional right of family integrity or because the right is so amorphous and conditional that no worker could know that his or her actions were in violation of the right. (citations omitted.)

In light of the glaring conflict between the Vermont Supreme Court and the U.S. District Court for the District of Vermont, child protective services social workers in Vermont are now in the untenable position that if they are sued in a Vermont state court for allegedly violating a plaintiff's federal constitutional rights to "family integrity", their case will be resolved on qualified immunity grounds through summary judgment in light of the Vermont Supreme Court's decision in *Billado*. However, if an action against them is brought in federal district court then they will be denied summary judgment, be denied the right to appeal and be forced to trial contrary to this Court's decisions in *Harlow* and *Behrens*.

In light of the compelling and overwhelmingly important considerations of federal law and uniformity of judicial decisions involved in the effective operation of a child protective services system where social workers must be able to lawfully perform their investigative duties without fear of retaliation, this Court should exercise its supervisory power to review this matter.

## CONCLUSION

For these reasons the petitioners respectfully request that their petition be granted so that they may be afforded their right to appeal the denial of their entitlement to the defense of qualified immunity to the Court of Appeals.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, Foley Square, on the 7th day of October, one thousand nine hundred and ninety-seven.

BEFORE: Hon. Amalya L. Kearse
Hon. Roger J. Miner (Filed Oct. 7, 1997)
Hon. José A. Cabranes
Circuit Judges Docket No. 97-9073

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WILKINSON V RUSSELL

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It is hereby ordered that appellees' motion to dismiss the appeal herein be and it hereby is GRANTED.

George Lange III, Clerk

By: /s/ Arthur M. Heller
Arthur M. Heller
Administrative Attorney

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

| | | |
|---|---|---|
| Thomas Wilkinson and Benjamin Wilkinson, by and through his father and guardian, Thomas Wilkinson, and Jonathan Weigand, by and through Thomas Wilkinson, his legal guardian | : | File No. 2:94-CV-175 |
| Plaintiffs, | : | |
| vs. | : | (Filed |
| Caroline S. Russell, James Adams, Gerald Jeffords | : | Jul. 31, 1997) |
| Defendants. | : | |

OPINION AND ORDER

This matter is before the Court on Defendants' Russell, Adams, and Jeffords Motion for Summary Judgment on Count I (Libel and Slander), Count II (Negligence), Count V (Deprivation of Civil Rights), Count VI (Denial of Due Process), Count VII (Conspiracy), Count VIII (Infliction of Emotional Distress), and Count IX (Negligence Per Se). This opinion concerns only the allegations set forth in Count I (Libel and Slander), Count VII (Conspiracy), and Count IX (Negligence Per Se). The Court has already ruled on the remaining counts. For the reasons that follow, Defendants' Motion for Summary Judgment in relation to Counts I, VII, and IX is granted.

## BACKGROUND

The following facts are either not in dispute or are supported by the affidavits and accompanying evidentiary material submitted by the Plaintiffs, as required by Fed. R. Civ. P. 56(e).[1] Plaintiff Thomas Wilkinson claims the Defendants, employees at Vermont Social and Rehabilitative Services ("SRS"), failed to investigate properly allegations that he sexually abused his son, Benjamin Wilkinson (Ben), and his step-son, Jonathan Weigand. Consequently, he was falsely accused of being a sex offender. He further contends they improperly communicated their findings to others.

On June 30, 1993 Judge Herbert Barall, the presiding judge in the child custody dispute between Wilkinson and his former wife Linda Weigand ("Weigand") in Connecticut, ordered that the Connecticut Department of Children and Families ("DCF") communicate with Vermont SRS regarding Wilkinson's children.[2] The Attorney

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[1] Familiarity with the facts of this case as set forth in the Court's previous opinion is assumed. *Wilkinson v. Balsam*, 885 F.Supp. 651 (D. Vt. 1995). Additional facts concerning Count 1 (Libel and Slander) are included in this opinion.

[2] Relevant portions of court transcripts for June 30, 1993 and July 7, 1993 are reproduced below:

June 30, 1993:

> **The Court:** I'd like to continue till next Wednesday and I want a representative from DCYS (DCF) here.
>
> **Attorney Benedict (Counsel for the minor children):** Wednesday, your honor?
>
> **The Court:** Yeah, even if they have to be subpoenaed . . . we will get somebody here. And

for DCF cited the Uniform Child Custody Jurisdiction

---

> will you tell Attorney Perlman (counsel for DCF) that I smell a potentially serious problem with this child. That I think they have a statutory obligation that has to be met. And that I want somebody here who has the authority . . . it doesn't have to be the commissioner that comes but I want somebody here who has the authority . . . District Director . . . who has the capacity to say, we're going to do what has to be done in accordance with the responsibility under the statute.

6/30/93 Transcript at 11-12 (Paper 161, Att.1)

July 7, 1993:

> **Mr. Shanley:** Your honor, my name is Paul Shanley. I'm the Program Supervisor in the New Britain sub-office which is part of the Hartford region. I'm here at the request of our regional administrator, Judy Roy (phonetic) . . .
>
> **Attorney Benedict:** The State of Vermont does not have an active equivalent of a Child and Family Services file, I've reported that to the Court last week.
>
> **The Court:** Yes I know, last week . . .
>
> **Attorney Elgo (From Attorney General's office, representing DCF):** Your honor, if I may, it's my understanding under the UCCJA (Uniform Child Custody Jurisdiction Act) the Court may be able to ask for a social study of some report from the Vermont Social Services. Our problem is that they were not cooperative with us.
>
> **The Court:** It seems to me that I want the name . . . you gave the name as Mr. Adam . . . but it seems to me that if they don't want to cooperate I want a communication between the top of your

Act,[3] the statute which provides uniform requirements for the exchange of information and mutual assistance between different state courts concerned with the same child. Wilkinson's attorney, who was present in the courtroom, did not object to the Judge's order. On July 13th Caroline Russell, SRS District Director in the Morrisville office, returned a phone call from Paul Shanley of Connecticut DCF. Shanley told her he had been ordered by the Connecticut court to contact SRS to obtain information to answer the Judge's concerns regarding the welfare of the children. He specifically asked for some documentation that he could provide to the court. According to Shanley's report to Judge Barall, Russell provided him with information about the case over the phone, including the substantiation of abuse charges against Wilkinson. Russell then contacted an attorney at the Deputy Attorney General's office, who advised her that SRS had a responsibility to provide DCF with information about SRS's involvement in the case.

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department to the top of their department to say what's going on.

7/7/93 Transcript at 8 (Paper 161, Att. 2)

[3] Section 1048 of the Uniform Child Custody Jurisdiction Act reads:

**1048. Assistance to courts of other states**

(a) Upon request of the court of another state the courts of this state which are competent to hear custody matters may order a person in this state to appear at a hearing to adduce evidence or to produce or give evidence under other procedures available in this state.

On July 15, 1993, in response to Shanley's request, Russell wrote to the Connecticut DCF. She began the letter by writing:

> It is my understanding that there is a question in the Family Court in Connecticut about which parent should have custody of these boys. In the interest of protecting Jon and Ben from further harm and abuse, I have been advised by our department's attorney that I am able to disclose the outcome of our investigations to you.

She went on to state again that SRS had "made a substantiation of sexual abuse perpetrated on Ben by Thomas Wilkinson" and had also "made a determination that sexual abuse was perpetrated on Jonathan by Tom Wilkinson." Russell provided this information despite a written consent agreement that had been entered into on May 3, 1993 between Wilkinson and SRS in which SRS had consented to "stay" an appeal process Wilkinson had begun to the Human Services Board pending the outcome of criminal and divorce litigation. The agreement provided, "In the interim, SRS will remove Wilkinson's name from its central registry as well as its substantiation of sexual abuse against him." Wilkinson claims he was slandered by Russell's remarks in the phone call and libeled by the content of the letter.

## DISCUSSION

### I. LIBEL AND SLANDER

To establish a cause of action in defamation in Vermont, a plaintiff must prove that a defendant 1) made a false and defamatory statement concerning the plaintiff,

2) acted with some negligence or greater fault in publishing the statement, 3) published the statement to at least one third person, 4) was not privileged in the publication of the statement, 5) caused plaintiff to suffer special damages, and 5) caused plaintiff actual harm to warrant compensatory damages. *Crump v. P&C Food Markets, Inc.*, 154 Vt. 284, 291, 576 A.2d 441.

Defendants contend that Russell's statements were privileged under the doctrines of judicial immunity and state qualified immunity. They further contend that the statements were not "published" as that term is used in an action for defamation.

a. Judicial Immunity

Vermont law has recognized the doctrine of judicial immunity which applies to judges, attorneys and witnesses since the cases of *Torrey v. Field*, 10 Vt. 353 (1838), and *Mower v. Watson*, 11 Vt. 536, 34 A.D. 704 (1839). (See also *Bannister v. Wakeman*, 64 Vt. 203, 23 A. 585 (1891) and *Laplaca v. Lowery*, 134 Vt. 56, 349 A.2d 235 (1975). In *Torrey v. Field*, the Vermont Supreme Court held:

> This privilege, or immunity . . . extends to parties, witnesses, jurors, judges and counsel, in courts of justice, in short, to anyone, who in the discharge of public duty or in pursuit of private rights, is compelled to participate in the administration of justice.

10 Vt. 353, at 414 (1838).

United States Supreme Court cases indicate that immunity analysis "rests on functional categories, not the status of the defendant." *Briscoe v. Lahue*, 460 U.S. 325, at

342 (1983). Absolute immunity flows not from rank or title, but from the nature of the responsibilities of the individual official. *Butz v. Economou,* 438 U.S. 478, 511 (1978). The Court in *Briscoe* further stated:

> In short, the common law provided absolute immunity from subsequent damages liability for all persons – governmental or otherwise – who were integral parts of the judicial process.

460 U.S., at 335.

Psychiatrists appointed by the court to conduct competency evaluations have been granted absolute immunity on the basis that they "perform functions essential to the judicial process." *Moses v. Parwatikar,* 813 F.2d 891, (8th Cir. 1987). The Eighth Circuit further stated that

> Non-judicial persons who fulfill quasi-judicial functions intimately related to the judicial process have absolute immunity for damage claims arising from their performance of the delegated functions . . . anything less than absolute immunity would defeat the requirement that the 'paths which led to the ascertainment of truth . . . be left as free and as unobstructed as possible.'

*Id.,* at 892, quoting *Briscoe,* 460 U.S. at 333.

In making the oral and written statements to Shanley, Russell was clearly responding to Judge Barall's order. Other Circuits have held that persons who faithfully execute valid court orders are absolutely immune from liability for damages in actions challenging conduct authorized by the order. *Henry v. Farmer City State Bank,* 808 F.2d 1228, 1238-39 (7th Cir. 1986) (sheriff who acted pursuant to official court order enjoyed quasi-judicial

absolute immunity); *Tymiak v. Omodt*, 676 F.2d 306, 308 (8th Cir.1982) (same); *Slotnick v. Garfinkle*, 632 F.2d 163, 166 (1st Cir. 1980) ("Judicial immunity extends as well to those who carry out the orders of judges."); *Kermit Constr. Corp. v. Banco Credito y Ahorro Ponceno*, 547 F.2d 1, 3 (1st Cir. 1976) (receiver who faithfully and carefully executes a court order shares the judge's absolute immunity). See also *Coverdell v. Dep't of Social and Health Services*, 834 F.2d 758, 764-65 (9th Cir. 1987) (child protective services worker was entitled to absolute quasi-judicial immunity from liability for damages stemming from worker's apprehension of newborn child at hospital pursuant to court order). The rationale for immunizing persons who execute court orders is apparent. Such persons are themselves "integral parts of the judicial process." *Briscoe*, 460 U.S. at 335. As the First Circuit has explained with respect to a receiver who acted pursuant to court directives:

> To deny him this [absolute] immunity would seriously encroach on the judicial immunity already recognized by the Supreme Court. . . . It would make the receiver a lightning rod for harassing litigation aimed at judicial orders. In addition to the unfairness of sparing the judge who gives an order while punishing the receiver who obeys it, a fear of bringing down litigation on the receiver might color a court's judgment in some cases . . .

*Kermit Constr. Corp.*, 547 F.2d at 3.

Plaintiffs claim that Russell's statements were made maliciously. The U.S. Supreme Court has held that because the purpose of the rule of absolute judicial

immunity is to protect the integrity of the judicial process, even malicious and corrupt acts are protected. *Pierson v. Ray*, 386 U.S. 547, 554 (1967); *Cleavinger v. Saxner*, 474 U.S. 193, 199-200 (1985).

In the instant case, the Court finds that Russell was, in the discharge of her public duty, "compelled to participate in the administration of justice." *Torrey v. Field*, 10 Vt. 353 (1838). Russell, in her phone call and report to Shanley, was acting pursuant to Judge Barall's order. Accordingly, Russell enjoys absolute immunity from damages allegedly occasioned by her statements.

b. State Qualified Immunity

In Vermont, qualified immunity attaches to lower-level state employees who are " '1) acting during their employment and acting, or reasonably believing they are acting, within the scope of their authority; 2) acting in good faith; and 3) performing discretionary, as opposed to ministerial acts.' " *Lashay v. Dept. of Social and Rehabilitation Services*, 160 Vt. 60, 65, 625 A.2d 224 (1993) (quoting *Levinsky v. Diamond*, 151 Vt. 178, 185, 559 A.2d 1073 (1989).

The Vermont Supreme Court has held that good faith exists where an official's acts did not violate "clearly established rights" of which the official reasonably should have known. *Levinsky*, at 190. The good faith question should not ask whether Wilkinson's rights were violated, but rather whether Russell "reasonably should have known that what she was doing violated the plaintiff's rights." *Murray v. White*, 155 Vt. 621, 630, 587 A.2d 975 (1991).

In this case, the Court finds that Russell did not reasonably know that by communicating with Paul Shanley she was potentially violating Wilkinson's rights under the tort of defamation in Vermont. Russell knew that the information she was communicating to Shanley was confidential.[4] Before writing the letter, she consulted an attorney who advised her that her actions were legal. Consequently, the good faith requirement is met and Russell is also protected by state qualified immunity.

c) Publication

The communication between Russell and her Connecticut counterpart Shanley was confidential under Vermont law. 33 V.S.A. (through Section 111(a) and (b)) expressly provides that information in SRS records shall not be disclosed to anyone except for purposes directly connected with the administration of the department or when required by law. There is no evidence that Russell communicated with anyone but Shanley. In addition, the information was provided to a court in which the proceedings and record were closed to the public. The Court finds that Russell's statements were not "published" and cannot properly form the basis for a claim that the plaintiff was defamed. See *Gross v. Haight*, 496 So.2d 1225, 1226-28 (La. App. Cir. 1986) (reports of suspected child abuse were not "published" where communications were kept confidential and were limited to officials who were privileged to receive the information and were necessary to the investigation).

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[4] 33 V.S.A. Section 306(a) (through Section 111(a) and (b)).

Plaintiffs claim that Linda Wiegand obtained a copy of Russell's letter through the Connecticut Family Court proceeding and distributed the letter to numerous persons including newspaper reporters. Even if this is the case, Russell did not publish the letter. Wilkinson has no cause of action against Russell for the actions of Wiegand.

## II. CONSPIRACY

In *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970), the U.S. Supreme Court held that to create a genuine issue of "conspiracy", plaintiffs have to point to at least some facts which would suggest that the defendants "reached an understanding" to violate the plaintiff's rights. These facts must be pled with sufficient specificity to suggest a "meeting of the minds" directed towards an unconstitutional action. *Deck v. Leftridge*, 771 F.2d 1168, 1179 (8th Cir. 1985).

In *Myers v. Morris*, 810 F.2d. 1437 (8th Cir. 1987), no conspiracy was found to have existed among a prosecutor, sheriff, sheriff's deputies, guardians, therapists, a court-appointed attorney and a police officer who had investigated, substantiated and arrested eight plaintiffs on child sexual abuse charges. The Eighth Circuit stated:

> A commonly held belief that a crime has been committed is not a conspiracy. Various people engaged in investigating and reporting suspected criminal activity does not amount to a conspiracy. We look for a genuine factual issue of concerted activity towards an unlawful objective.

*Id.*, at 1454.

Clearly there was a commonly held belief among Russell, Jeffords and Adams that a crime had been committed by Wilkinson. However, the Court finds no evidence which suggests any mutual understanding or "meeting of the minds" in any conspiracy to deprive Wilkinson and his son and step-son of constitutional rights.

## III. NEGLIGENCE PER SE

Plaintiffs allege that the Defendants were negligent *per se* in failing to follow the statutory mandates under 33 V.S.A. Chapter 49 regarding the reporting and investigation of reports of child abuse. Paragraph 92(a) through (e) in the amended complaint outlines the allegations.

a. Paragraph 92(a) concerns former Defendant Balsam only.

b. Paragraph 92(b) alleges that Defendant Adams did not interview the children in the presence of a disinterested adult as required by 33 V.S.A. 4915(b). However, 33 V.S.A. 4915(b)(2) only requires the presence of a disinterested adult when the interview of the child takes place without the approval of the child's parents, guardian or custodian. Since the children's mother, Weigand, gave permission for Adams to interview her children, there was no violation of Section 4915(b).

c. Paragraph 92(c) alleges that neither Defendant Adams nor Defendant Jeffords fully investigated a report that Weigand sexually abused her nephew. Plaintiffs

claim this was in violation of 33 V.S.A. 4913(a)[5] and 4914. Section 4913(a) sets the statutory requirement of reporting suspected child abuse within 24 hours. Section 4914 describes to whom the report should be made, and includes the relevant information the report must contain.

The facts reveal that Craig Martin, Weigand's brother-in-law, called a "hot line" number he got from the phone book "some time in January, 1993", and spoke to a woman who he thinks was in "law enforcement".[6] He told her his two year old son had told him that Weigand (the child's aunt) had touched his privates. This woman, upon hearing this, would have had the statutory responsibility to contact SRS and make a report within 24 hours. There is no evidence indicating that she did or didn't make the report. On January 27, the State's Attorney's office called Adams and informed him of the allegation.

Plaintiffs do not include 33 V.S.A. 4915 in this claim. Section 4915 sets out the standards for investigating suspected child abuse. Regardless, the facts establish that Adams called Craig Martin on February 2, 1993 in an attempt to begin an investigation. Martin refused to let Adams speak with his child. Martin and his wife also told Adams that they had concluded that no abuse had taken place.

d. Paragraph 92(d) alleges that the SRS Defendants did not report or investigate Wilkinson's complaint of Weigand's abuse or neglect of the children as required by

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[5] The plaintiffs mistakenly cite 33 V.S.A. 4913(1).

[6] Deposition of Craig Martin at 24-29 (Paper 162, Att. 14).

sections 4913(a), 4914, or 4915. According to paragraph 34 of the Amended Complaint, Wilkinson is referring to the assertion he made during his SRS appeal hearing that the boys were being coached by Wiegand. 33 V.S.A. sections 4913, 4914, and 4915 require that reports of "child abuse"[7] be reported to the commissioner and investigated. There is no evidence that the Defendants had any information which would lead them to believe Weigand's alleged coaching rose to the level of child abuse that mandated reporting and investigation under Vermont law. Further, there is evidence that Adams spoke to Dr. Stephen Balsam about the issue of Ben being coached by Weigand, as well as the possibility that Weigand had been her son's victimizer. Dr. Balsam told Adams he saw no evidence of coaching, and that he was not suspicious of Weigand as being the abuser.

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[7] 33 V.S.A. section 4912 reads:

**4912. Definitions**

(2) An "abused or neglected child" means a child whose physical or mental health or welfare is harmed or threatened with harm by the acts or omissions of his parent or other person responsible for his welfare or a child who is sexually abused by any person.

(3) "Harm" to a child's health or welfare can occur when the parent or other person responsible for his welfare:

(A) inflicts, or allows to be inflicted upon the child, physical or mental injury; or

(B) commits or allows to be committed against the child, sexual abuse; or

(C) fails to supply the child with adequate food, clothing, shelter or health care . . . ; or

(D) abandons the child.

e. Paragraph 92(e) alleges that Russell violated 33 V.S.A. Section 4916 in disseminating information about child abuse. As stated above in relation to the allegation of defamation, the Court has found that Russell's remarks were privileged under the doctrines of judicial immunity and state qualified immunity, and were not "published" as required in an action for defamation. Accordingly, there can be no violation of Vermont law in relation to this claim.

## IV. CONCLUSION

Defendant's Motion for Summary Judgment (paper 161) in relation to Count I is GRANTED.

Defendant's Motion for Summary Judgment (paper 161) in relation to Count VII is GRANTED.

Defendant's Motion for Summary Judgment (paper 161) in relation to Count IX is GRANTED.

Dated at Burlington, Vermont this 1st of August, 1997.

/s/ William K. Sessions, III
William K. Sessions, III
United States District Court Judge

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

| | | |
|---|---|---|
| Thomas Wilkinson and Benjamin Wilkinson, by and through his father and guardian, Thomas Wilkinson, | : | File No. 2:94-CV-175 |
| Plaintiffs, | : | |
| v. | : | |
| Stephen J. Balsam, M.D., Carolyn S. Russell and James Adams, | : | (Filed Apr. 17, 1995) |
| Defendants. | : | |

OPINION AND ORDER

Thomas Wilkinson claims that he was falsely accused of sexually abusing his young son, Benjamin Wilkinson (Ben), and stepson, Jonathan Wiegand. He brought this action in state court on his own and Ben's behalf, against Steven J. Balsam, M.D., a psychiatrist who treated Ben, Jonathan and their mother, Linda Wiegand, and against two employees of the Vermont Department of Social and Rehabilitation Services (SRS), Carolyn S. Russell and James Adams. The case was removed to this court on the ground that the complaint contains a federal civil rights claim in addition to several state tort claims.

Specifically, the complaint is predicated on the following legal theories, against individual defendants as stated: (1) slander, against Balsam; (2) negligence in the

evaluation and diagnosis of Ben, against Balsam; (3) malpractice in the treatment of Ben, against Balsam; (4) "family malpractice," against Balsam; (5) deprivation of civil rights, against Adams; (6) "ultra vires substantiation," against Russell; (7) conspiracy, against all three defendants; and (8) infliction of emotional distress, against all defendants.

Several motions are now pending, most notably motions for summary judgment filed by the defendants. To analyze the motions for summary judgment, it is necessary to review in detail the facts adduced by the plaintiffs.

## FACTS

The following facts are either not in dispute or, if they are in dispute, are supported by the affidavits and accompanying evidentiary material submitted by the plaintiffs, as required by Fed. R. Civ. P. 56(e).

"After a separation of a few months, Wilkinson commenced a divorce proceeding against Wiegand in Connecticut in September 1992, seeking joint custody of their child Ben, who was born on January 8, 1989. Wiegand opposed joint custody and sought sole custody of Ben. Wiegand subsequently moved to Stowe, Vermont, with Ben and her son from a prior marriage, Jonathan, born January 3, 1986. Jonathan had a history of emotional difficulty. Throughout 1992, Wilkinson exercised regular visitation with the two children.

In late 1992, Wiegand was referred by her physician, Gordon Ahlers, to Dr. Balsam, a licensed psychiatrist then

practicing in Burlington. During her second visit with Balsam, she discussed concerns about her children acting out sexually, specifically mentioning her concern that Wilkinson might have sexually abused them. Balsam saw the children first on January 6, 1993 and concluded after the one session that Wilkinson had sexually abused the boys, perhaps in the context of devil worship.

Balsam met with the boys again on January 14, when they showed him drawings depicting sexual contact between Wilkinson and Ben, including anal and oral intercourse. There was no physical evidence for such abuse: Dr. Ahlers examined the children on January 14 and found no signs of abuse. After seeing the boys, Balsam told Wiegand that Ben had been sexually abused by his father and urged her to report the abuse to SRS. Balsam also related his conclusions to Dr. Ahlers. At about this time, Wiegand's mother, Carol Morrisey, spoke to Balsam and told him it was her belief that *Wiegand* might be sexually abusing the two children. He told her not to report her suspicion to SRS.

On January 18 or 19, 1993, Wiegand reported to SRS that Wilkinson had abused Ben. Balsam too called SRS and confirmed the report, stating that he was certain of its truth. He indicated that Wilkinson may have abused Jonathan as well, but did not mention Morrisey's belief that Wiegand herself may have abused the children. SRS assigned the matter to defendant Adams, a social worker at SRS's Morrisville office, for investigation.

On January 21, Adams and Stowe police officer Bruce Merriam interviewed Wiegand, Ben and Jonathan. A transcript of the taped interview with Ben has been filed with

the court. During the interview Ben, just 4 years old, says that his father committed various sexual acts upon him, but he also says that he made things up and that his mother made him say things. For example, after Ben affirmatively answers Adams's query whether "daddy put his penis in your mouth," Ben says "I made it up." Adams asks, "You made it up?" Answer: "Yeah. She makes me say it. I did it for mom." Transcript at 11. At another point, Ben, showing a picture he drew, says "Dad put his tongue in my butt." He then says "Someone told me to make it up." Transcript at 18. The interviewers frequently ask leading questions and suggest the answers they wish to hear. For example, after Ben is asked whether his father put his penis in Ben's "butt," Ben's response is at first unclear. Adams pursues, "Did he ever do that, yes or no?" Again, Ben's answer is unclear. Adams: "Did someone tell you to say that or did it really happen?" Ben: "It really happened." Adams responds: "It really happened. Okay. *That's what we need to know.*" Transcript at 20-21 (emphasis added). Later, Adams asks whether Ben "like[s] to sing Devil songs with Daddy." Ben says "Uh-huh." Transcript at 24.

Upon concluding these interviews, SRS substantiated the report of abuse against Wilkinson.[1] On the same day, Detective Merriam contacted Balsam, who confirmed his views of the matter, including his belief that the abuse

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[1] " 'Substantiated report' means that the commissioner [of SRS]or the commissioner's designee has determined after investigation that a report is based upon accurate and reliable information that would lead a reasonable person to believe that the child has been abused or neglected." 33 V.S.A. § 3412(10).

occurred as part of a devil worship ritual. Merriam swore out an affidavit of probable cause, and on January 25, Wilkinson was arrested and charged with sexually abusing his son. He denies the charges. He pled not guilty and was released on bail with the condition that he have no contact with Ben.

On January 27, 1993, Adams was informed that Wiegand's nephew had complained to his father, Craig Martin, that Wiegand had sexually abused him. Adams shared this information with Balsam, but not with Wilkinson. During this period, and for about six months thereafter, Balsam continued to treat the two boys as victims of sexual abuse perpetrated by Wilkinson.

On February 9, 1993, Adams and his supervisor, Gerald Jeffords, notified Wilkinson in writing that SRS had substantiated the report of child abuse involving Ben. Prior to this time, no one at SRS had contacted or notified Wilkinson investigation. Wilkinson *about the* thereupon began the appeal process to the Human Services Board, explaining that he believed Wiegand had coached her sons to make the allegations of sexual abuse in retaliation for his seeking joint custody of Ben. He reported his belief that such coaching placed the children in substantial risk of harm and asked SRS to investigate. Jeffords responded by letter on February 25, stating: "I have decided to not accept your letter as a report of abuse or neglect. This situation has already been investigated and the case is closed." Wilkinson attended an informal hearing on March 14 with Adams, Jeffords and Russell, the SRS District Director in Morrisville. By letter the following week, Russell explained that after reviewing the record, including documents submitted by Wilkinson,

and after speaking with Balsam, she had determined to uphold the substantiation decision.

On May 3, 1993, Wilkinson and SRS entered into a written consent agreement to stay the appeal to the Human Services Board pending the outcome of the criminal and divorce litigation. The agreement provided further: "In the interim, SRS will remove Thomas Wilkinson's name from its registry as well as its substantiation of sexual abuse against him." On May 12, Adams informed Wilkinson that SRS had initiated an investigation of allegations that Wilkinson had abused Jonathan, noting that this matter too was "on hold" and that SRS would "stay" a decision to substantiate the abuse of Jonathan.

At about this time, the Connecticut family court appointed Wilkinson' sister, Karen Wilkinson, as Ben's guardian. Wiegand disappeared with the children.

On July 15, 1993, notwithstanding the consent agreement, Russell wrote to the Department of Children and Connecticut Families. She stated that SRS "made a substantiation of sexual abuse perpetrated on Ben by Thomas Wilkinson" and "made a determination that sexual abuse was perpetrated on Jon by Tom Wilkinson," and provided details of the allegations. She opined that "[i]f either of the boys were to be ordered in [Karen Wilkinson's] custody this could place them at great risk of harm and further abuse by Mr. Wilkinson."

In July 1993, the State of Vermont withdrew the criminal complaint against Wilkinson, because of insufficient evidence and indications that Wiegand had lied about other matters.

The Connecticut family court appointed Dr. Kenneth Robson to evaluate the family; he met with Wilkinson, Wiegand (who had reappeared), both children, and Karen Wilkinson, and spoke with Balsam and Lee Dow, Esq., the assistant state's attorney in the criminal case. He also reviewed the transcripts of Adams's interviews with the children, medical and psychological records, the children's drawings, depositions from the criminal case, and other written material. Robson completed his report in December 1993. It contains a severe critique of the methods used by Balsam and SRS, and contradicts their conclusions, finding the allegations of sexual abuse by Wilkinson to be "highly unlikely." Robson Report at 86.

After the report was filed with the Connecticut family court, the court revisited the custody issue and awarded Wilkinson custody and guardianship of both children. Wiegand again disappeared with the children. Attempts to locate them have failed.

Because Dr. Robson's observations are vital to the plaintiffs' case and to resolving the summary judgment motions, they are discussed here in some detail.

Robson notes the conflicting roles performed by Dr. Balsam: "As is appropriate for a *therapist*, he developed a strong and positive relationship and position of advocacy for Ms. Wiegand from the beginning. As her therapist and that of the boys, it would be virtually impossible and clinically inadvisable for him to *simultaneously* conduct an impartial *evaluation* of allegations of sexual abuse." *Id.* at 15 (emphasis in original). Robson notes further:

> Not only was this differentiation not made by Dr. Balsam, but he went forward with the treatment of both boys with the conviction that sexual abuse had occurred. He reached that conviction early in his contacts with the boys and seems not to have utilized a substantial amount of information that is always essential in assessing the credibility of such allegations. Such information would include detailed family histories of both parents, marital histories, developmental histories of both boys, psychiatric histories of both parents and their families, current practices within the home that would expose the children to overstimulation or explicit sexual materials, and observations of both children with the alleging parent and unless absolutely contraindicated, the alleged perpetrator. . . . [T]he *context* of these allegations and their *timing* in relation to an intensifying custody dispute should alert any clinician as to cautious assessment of these allegations.

*Id.* at 15-16 (emphasis in original). Robson opines that Balsam "reached a definitive conviction that these allegations were true after only brief clinical contact that *disregarded the usual standards* by which such complex allegations are evaluated and in the absence of much supporting data which could have been available to him." *Id.* at 20 (emphasis added). He states further:

> Not only did [Balsam] fail to differentiate the evaluative versus the therapeutic roles, but his evaluation was *technically flawed in serious ways.* Linda Wiegand was already his patient and by extension the children as well; his advocacy was on their behalf even though he made every effort to be evenhanded. It does not appear that

> he gathered significant background information on either parent including a history of the marital relationship and the custody conflict that was at the center of it as it began to dissolve. He did not conduct interviews that systemically observed the interaction between Linda Wiegand and each of the children alone and together with her which would have been revelatory of the kinds of data I observed several months later. The exclusion of the alleged perpetrator from the evaluation was absolute and kept Dr. Balsam from access to clinical observations that might have altered his point of view regarding the credibility of the allegations.

*Id.* at 80-81 (emphasis added).

In his report Dr. Robson also assesses Adams's and Merriam's interview with the boys on January 21, 1993. That interview begins with a "definite bias." *Id.* at 20. Robson notes Ben's recantations and the indications of maternal coaching in the interview ("I made it up," "she makes me say it," and other examples) and opines: "It seems to me *extremely important* that he [Adams] does not follow-up this recantation or inquire about it at that time." *Id.* at 21 (emphasis in original). Robson states his "impression that there is an increasing need on the interviewer's part to document the allegations despite the confusion and nonconfirmatory information being provided to him." *Id.* at 22. Robson discusses other infirmities, such as Adams's improper, leading use of anatomically correct dolls. *Id.* at 23. Robson concludes:

> This interview is particularly worrisome to me. It appears biased from the beginning. There are numerous examples of leading throughout its content. There are spontaneous communications

> from Benjamin that at least seriously raise the question of coaching on his mother's part that are neglected by the interviewer. And there is confusing information that is far from explicit when the interviewer attempts to document a particular time, place, and interaction.

*Id.* at 23-24. And later in the report:

> The interview of both boys by James Adams and Officer Merriam was seriously flawed. There are numerous episodes of leading in these interviews. The boys' uncertainty as to the allegations, and their allusions to maternal influence are *ignored* by the interviewer. There is little or no effort to establish a relationship with either child prior to actively discussing the allegations of abuse. My impression is of a presumption on the part of the interviewers that abuse had occurred and ignoring of other cues and sources of information that might contribute to a more neutral and objective clinical assessment.

*Id.* at 81 (emphasis in original).

Robson also notes that "Ms. Wiegand's eagerness and enthusiasm to gather information whether it was pictures, documents, teddy bears, etc. throughout the process of the allegations is more compatible with the behavior of adults in situations involving false allegations of sexual abuse." *Id.* at 83.

Robson considers aspects of the children's allegations themselves which bear on credibility, noting that they lack specificity as to time, place and setting, and have a "canned" quality, that they "became preposterous and impossible" (e.g., Jonathan, lying in his upper bunk, seeing Wilkinson's penis "in Ben's butt"), and that Jonathan

showed uncertainty and confusion following Ben's recantations, among other indications of incredibility. *Id.* at 83-85. Further, "[t]he fact that there were normal physical findings in the examination performed by Dr. Ahlers, despite allegations of repeated anal penetration, is more supportive of the lack of credibility of these allegations." *Id.* at 85-86.

Plaintiffs have also submitted affidavits by Douglas Dennett, M.D., and Roger Kessler. Dr. Dennett, an expert in child psychiatry, having reviewed much of the written evidence, opines that both Balsam and Adams were grossly negligent in a number of respects in this case and that they, along with Russell and Jeffords, had no "objective, reasonable basis to continue their substantiation of the abuse." Kessler, a psychologist who knows and has worked with Adams, Russell and Jeffords at the Morrisville SRS office, opines that those individuals were aware of a parent's constitutionally protected interest in the companionship of their children.

Plaintiffs also allege, although this point does not appear to be supported by evidence, that Balsam, Adams and Russell aided and abetted Wiegand in secreting herself and the children.

## DISCUSSION OF PENDING MOTIONS

### 1. Plaintiffs' Motion to Join Parties and Amend Complaint

This motion was filed on July 26, 1994, approximately one and a half months after filing of the initial complaint, and prior to any discovery (which is presently stayed

pending disposition of the instant motions). The motion seeks to join Jonathan Wiegand as a plaintiff and Linda Wiegand, SRS and Gerald Jeffords as defendants, pursuant to Fed. R. Civ. P. 20(a) (permissive joinder), and to amend and add to the counts and factual allegations in the complaint, pursuant to Rule 15(a). The claims continue to focus on the same incidents as set forth in the initial complaint.

The following counts are pled in the amended complaint, against defendants as specified: (1) libel and slander, against all defendants; (2) negligence, against all defendants except Wiegand; (3) malpractice in connection with treatment of Ben and Jonathan, against Balsam; (4) "family malpractice," against Balsam; (5) deprivation of civil rights in violation of 42 U.S.C. § 1983, against Adams; (6) denial of due process in violation of 42 U.S.C. § 1983, against Adams, Jeffords, Russell and SRS; (7) conspiracy in violation of 42 U.S.C. § 1983, against all defendants; (8) infliction of emotional distress, against all defendants; and (9) negligence per se (failure to follow statutory law on reporting and investigating abuse), against all defendants except Wiegand.

The defendants oppose the motion, asserting that it is made in bad faith and is futile because the proposed amendments cannot survive summary judgment. The latter claim is premised on the defendants' contention that the present, unamended complaint cannot survive summary judgment, largely on the basis of defendants' asserted immunity defenses, and that the proposed amendments do not alter this fact. For reasons set forth below, however, the court today denies defendants'

motions for summary judgment. The proposed amendments do not appear to be futile. Further, there is no evidence of bad faith on plaintiffs' part.

Accordingly, plaintiffs, motion to join parties and to amend their complaint (paper # 38 in the court's file) is GRANTED.

2. Motion for More Definite Statement.

Russell and Adams filed this motion to seek clarification with respect to Count VIII, entitled "Infliction of Emotional Distress." As pled initially, the count does not make clear whether plaintiffs are seeking to recover for intentional or negligent infliction of emotional distress, two different theories. In their opposition to the motion, however, plaintiffs make it plain that Count VIII is for intentional infliction of emotional distress, and Adams and Russell have since filed a supplemental answer responding to the allegations in Count VIII.

The motion (paper # 25) is accordingly DENIED as moot.

3. Balsam's Motion for Summary Judgment.

Summary judgment may be granted only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In considering the motion, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a

genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255.

Balsam moves for summary judgment on all claims against him raised by Wilkinson (Counts I, II, III, IV, VII and VIII of the initial complaint) and for partial summary judgment as to the conspiracy and intentional infliction of emotional distress claims (Counts VII and VIII) made against him by Ben. He raises several distinct issues, discussed below in turn.

a. Statutory Immunity

Vermont law requires a physician who reasonably suspects child abuse to report to SRS. 33 V.S.A. § 4913(a) provides:

> Any physician . . . who has reasonable cause to believe that any child has been abused or neglected shall report or cause a report to be made in accordance with the provisions of section 4914 of this title [providing that such report is to be made to SRS] within 24 hours.

One who files a report in accordance with this provision is entitled to good faith immunity:

> Any person enumerated in subsections (a) or (b) of this section, other than a person suspected of child abuse, who in good faith makes a report to the department of social and rehabilitation services shall be immune from any civil or criminal liability which might otherwise be incurred or imposed as a result of making a report.

33 V.S.A. § 4913(c).

Balsam contends that he is immune, by virtue of § 4913, from any liability he might otherwise have incurred as a result of his having filed, or caused to have filed, a report of abuse with SRS.

Plaintiffs respond to this contention by arguing, first, that the immunity of § 4913(c) covers only a person who has made a report within 24 hours of suspecting abuse, and that Balsam waited more than 24 hours before reporting. This argument is unpersuasive. The statute indeed requires reports to be made within 24 hours, but the immunity provision is not limited to those who *timely* report. To the contrary, § 4913(c) gives immunity to *any person* enumerated in the preceding sections (such as a physician) who in good faith makes a report to SRS.

More problematic for Balsam, however, is the limitation of the grant of immunity to those who report "in good faith." A genuine issue of fact exists as to whether Balsam acted in good faith in reporting his beliefs, and continuing to validate the allegations after the initial report. For example, Wiegand's mother, Carol Morrisey, stated in her deposition that when she learned Wiegand had taken the boys to see Dr. Balsam, she called him on January 19, 1993 to discuss her concerns that Wiegand herself may be abusing or neglecting the children. She told Balsam that she intended to call SRS with this information. Balsam urged her not to call SRS, as it would "hurt" Wiegand's case. Given Balsam's involvement in the matter as Wiegand's therapist and, perhaps, advocate, the evidence provided by Morrisey (credited as true, for purposes of the summary judgment motion) suggests that Balsam was deceitful – in short, that his actions were undertaken without good faith.

Further, the statute grants good faith immunity only with respect to liability incurred "as a result of making a report." Balsam's actions in this case were not limited to making a report. He rendered a diagnosis that Ben is a victim of his father's sexual abuse, and offered his opinions to Wiegand, the Stowe police and others. There is evidence that his diagnosis is the result of gross negligence. To the extent the plaintiffs' damages flow from the flawed diagnosis, independent of the SRS report, Balsam cannot benefit from the immunity granted by § 4913(c).

b. Privilege

Balsam argues that any statements he made to Stowe police officers in the course of their criminal investigation are protected by an absolute privilege, thereby defeating the slander count (as well as the conspiracy and emotional distress counts to the extent they are predicated on statements to the police).

Although it does not appear that Vermont courts have spoken on this question, there is authority for Balsam's claim of privilege. See Restatement (Second) of Torts § 588 (1977) (witness absolutely privileged to publish defamatory matter "in communications preliminary to a proposed judicial proceeding"); *Frazier v. Bailey*, 957 F.2d 920, 932 (1st Cir. 1992). It seems likely the Vermont Supreme Court, if faced with the issue, would adopt the Restatement principle. *See Crump v. P & C Food Markets, Inc.*, 154 Vt. 284, 292 (1990) (following Restatement in related context). Balsam's statements to Merriam, once a criminal investigation had commenced, arguably fit within the privilege.

Nevertheless, the privilege is of little avail to Balsam. Detective Merriam had participated in the interviews with the boys and Wiegand prior to his telephone conversation with Balsam. Thus, the criminal investigation (and the consequent injury to Wilkinson) ensued at least in part because of Balsam's report to SRS, not only because of his direct communications with Merriam. More broadly, the defamation and related counts are not limited to harm caused by Balsam's statements to police officers; Balsam spoke to other individuals as well.

c. Duty to Wilkinson

Balsam next contends that, as he treated only Ben, Jonathan, and Wiegand, he owed no duty as a matter of law to *Wilkinson*, who was never his patient, and therefore he is entitled to summary judgment as to the claims of professional negligence and malpractice (Counts II, III and IV) brought by Wilkinson.

"The first prerequisite in any negligence proceeding must be to establish the existence of a legally cognizable duty." *Smith v. Day*, 148 Vt. 595, 597 (1987). " 'Duty' may be viewed as 'an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection.' " *Denis Bail Bonds, Inc. v. State of Vermont*, 159 Vt. 481, 487 (1993) (quoting W. Prosser & W. Keeton, The Law of Torts § 53, at 358 (5th ed. 1984)).

Balsam asserts that the mental health professional's duty is owed only to the patient. This is certainly not always the case. For example, in *Peck v. Counseling Service*

*of Addison County, Inc.*, 146 Vt. 61, 65 (1985), the Vermont Supreme Court recognized that under certain circumstances a therapist owes a duty of care to potential victims of the therapist's patient. "Once a therapist determines, or, based on the standards of the mental health professional community, should have determined that his or her patient poses a serious risk of danger to another, then he or she has the duty to take whatever steps are reasonably necessary to protect the *foreseeable victim* of that danger." *Id.* at 66-67 (emphasis added).

Foreseeability is central to the analysis. " 'The existence of a duty is primarily a question of law, and dependent upon a variety of relevant factors, of which foreseeability of the risk is a primary consideration. . . . ' " *Langle v. Kurkul*, 146 Vt. 513, 519 (1989) (quoting *Coulter v. Superior Court*, 21 Ca1.3d 144, 152, 577 P.2d 669, 674, 145 Cal. Rptr. 534, 539 (1978) (internal quotation omitted)). For example, in *Smith v. Day*, the Vermont Supreme Court held that a university owed no duty of care to third persons harmed by the criminal acts of the university's students, noting that the university "had absolutely no reasonably foreseeable notice" of the student's acts. 148 Vt. at 598.

In this case, the issue is not harm to a third party perpetrated by a patient of the psychiatrist, but harm to the third party arising *directly* from the psychiatrist's negligent evaluation and treatment of his patient. But the analysis proceeds as in *Peck*, *Langle* and *Smith*. The question remains whether there are sufficient facts in evidence in the particular case to warrant the conclusion that the psychiatrist's conduct will foreseeably harm the third

party; if so, the psychiatrist owes a duty of care to the third party.

Here, plaintiffs have adduced sufficient facts to create a genuine issue as to whether Balsam ought reasonably to have foreseen that his negligent evaluation, diagnosis, and treatment of Ben and Jonathan, and his decisions to report his own conclusions but to dissuade Morrisey from reporting hers, would cause injury to Wilkinson. If the factfinder determines that harm to Wilkinson was foreseeable in the circumstances, then Balsam owed a legal duty to Wilkinson to conform his conduct to the appropriate standard of care. Balsam is not entitled to summary judgment on the issue.

d. Intentional Infliction of Emotional Distress

To prove the tort of intentional infliction of emotional distress in Vermont, the plaintiff must demonstrate "outrageous conduct, done intentionally or with reckless disregard of the probability of causing emotional distress, resulting in the suffering of extreme emotional distress, actually or proximately caused by the outrageous conduct." *Crump v. P & C Food Markets, Inc.*, 154 Vt. at 296 (internal quotations omitted).

Disputed facts exist as to each of the elements of this tort. If plaintiffs' evidence is credited, Dr. Balsam reached and reported a false conclusion that Wilkinson had sexually abused Ben – had subjected Ben to anal and oral intercourse during satanic ritual – on flimsy evidence and in a grossly negligent manner, ignoring his own conflict of interest as Wiegand's therapist and advocate, knowing

that his verdict would probably occasion a criminal prosecution of Wilkinson, the most profound abhorrence among his fellows, and the forced alienation of his son. And he continued to validate the claims of abuse and continued to treat the children as victims of Wilkinson's depredations even in the face of evident maternal coaching and Wiegand's nephew's complaint that *Wiegand* had sexually abused him. The court has little difficulty in concluding that such conduct is "outrageous." And it should go without saying that in our culture these charges cause deep pain and humiliation – extreme emotional distress.

Balsam's motion for summary judgment (paper # 5) is accordingly DENIED.

4. Russell's and Adams's Motion for Summary Judgment

Russell and Adams also move for summary judgment, but on different issues than those raised in Balsam's motion. As employees of a state agency acting within the scope of their employment, Russell and Adams contend they are immune from suit under the doctrine of qualified official immunity. The scope of this doctrine depends on whether a claim arises under federal or state law, and hence the federal and state claims are discussed separately below. Russell and Adams also argue that Counts VI ("ultra vires substantiation") and VII ("conspiracy") fail to state causes of action under state law.

As to the latter point, in their amended complaint plaintiffs have recast Counts VI (now denominated "denial of due process") and VII to make clear that both

are intended to state federal causes of action under 42 U.S.C. § 1983. Defendants' request to dismiss these counts for failure to state causes of action under state law is accordingly denied.

a. Federal Qualified Immunity

> "Qualified immunity strikes a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions." *Wyatt v. Cole*, 112 S.Ct. 1827, 1833 (1992). The doctrine is now well established "that government officials performing discretionary functions are shielded from 'liability for civil damages insofar as their conduct [did] not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Id.* at 1832 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

In a recent decision, the Second Circuit Court of Appeals reviewed the doctrine as follows:

> Whether a defendant actually violated a plaintiff's rights is not the central issue: "Even defendants who violate constitutional rights enjoy a qualified immunity that protects them from liability for damages unless it is further demonstrated that their conduct was unreasonable under the applicable standard." *Davis v. Scherer*, 468 U.S. 183, 190 (1984); *see also Kaminsky v. Rosenblum*, 929 F.2d 922, 925 (2d Cir. 1991) ("[Q]ualified immunity is generally considered separate and apart from the merits of the case,

> even though plaintiff's factual allegations must be examined . . . in resolving the immunity issue."); *Collins v. Marina-Martinez*, 894 F.2d 474, 478 (1st Cir. 1990) ("Because qualified immunity does not address the substantive viability of a section 1983 claim, but rather the objective reasonableness of a defendant's actions, a plaintiff who is entitled to prevail on the merits is not necessarily entitled to prevail on the issue of qualified immunity."). "Essentially, if it is objectively reasonable for an official to believe that he or she is acting within constitutional and statutory bounds, the official will be insulated from liability stemming from his or her conduct." *Natale v. Town of Ridgefield*, 927 F.2d 101, 104-05 (2d Cir. 1991).

*Zahra v. Town of Southold*, No. 93-9067, slip op. at 29-30 (2d Cir. Feb. 21, 1995).

Both the state of constitutional law at the time of the challenged conduct and the reasonableness of the official's belief as to the lawfulness of that conduct are relevant to the inquiry. "The defense of qualified immunity shields governmental officials from civil liability if the official's conduct did not violate constitutional rights that were clearly established at the pertinent time or if it was objectively reasonable for the official to believe that the conduct did not violate such rights." *Cecere v. City of New York*, 967 F.2d 826, 829 (2d Cir. 1992); *accord van Emrik v. Chemung County Dept. of Social Services*, 911 F.2d 863, 865-66 (2d Cir. 1990).

Moreover, the doctrine provides for immunity not just from liability but from *suit*, and is therefore often appropriate for disposition upon a motion for summary

judgment. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). But this is not always the case. In *Zahra*, for example, the immunity defense was "properly before the court at the close of the evidence." Slip op. at 30 n.7. "When a qualified immunity is asserted in a motion for summary judgment . . . the facts material to the claim of qualified immunity must not be genuinely disputed." *Cecere*, 967 F.2d at 829. The record prior to trial may simply be inadequate to determine whether an official can claim the protection of qualified immunity. *Hill v. City of New York*, 45 F.3d 653, 663 (2d Cir. 1995). "To some extent the availability of qualified immunity turns on inquiries into specific facts." *Id.*

That is the case here. For the reasons set forth below, I am satisfied that the evidence submitted by the plaintiffs, *if proved*, is sufficient to support a finding that Russell and Adams violated the clearly established constitutional rights of the plaintiffs and that they did not have an objectively reasonable basis to believe that their conduct did not violate such rights.

In *Santosky v. Kramer*, 455 U.S. 745, 753 (1982), the Supreme Court noted its "historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." Earlier, in *Stanley v. Illinois*, 405 U.S. 645, 651 (1972), the Court wrote:

> The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), "basic civil rights of man," *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), and "[r]ights

> far more precious . . . than property rights," *May v. Anderson*, 345 U.S. 528, 533 (1953).

Moreover, "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents." *Santosky*, 455 U.S. at 753.

The right of family integrity is not absolute of course, nor are its dimensions sharply defined. Courts have emphasized "the amorphous nature of a liberty interest in familial relationships." *Frazier v. Bailey*, 957 F.2d at 931 (social workers entitled to qualified immunity where plaintiff failed to show that their actions in responding to allegations of sexual abuse violated right of family integrity; "the dimensions of this right have yet to be clearly established"); *see Anderson v. Creighton*, 483 U.S. 635, 640 (1987) ("The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.").

However, not every interference with the right of family integrity is insulated from legal challenge merely because that right is amorphous and its outer dimensions have yet to be clearly established. Particular aspects of the broad right *are* clearly established. The state, for example, must prove by clear and convincing evidence that a parent is unfit before terminating parental rights. *Santosky*, 455 U.S. at 769. Moreover, parents are always constitutionally entitled to be free of the state's *arbitrary* interference in familial relationships. This is but an instance of a general principle of substantive due process under the Fourteenth Amendment. *See, e.g., Washington v. Harper*, 494 U.S. 210, 221-22 (1990) (prison inmate with

mental illness has liberty interest under due process clause in being free from arbitrary administration of antipsychotic drugs against his will); *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 225 (1985) (university did not violate substantive due process right of student who was dismissed from academic program where its actions were not arbitrary and record demonstrated that "the faculty's decision was made conscientiously and with careful deliberation, based on an evaluation of the entirety of [the student's] academic career"); *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982) (in reviewing challenge by involuntarily committed mentally retarded persons to their conditions of confinement, substantive due process "requires that the courts make certain that professional judgment in fact was exercised"); *Parham v. J.R.*, 442 U.S. 584, 606-615 (1979) (state's procedure for institutionalizing children for mental health care upheld where decision represents independent judgment of what child requires and is not arbitrary); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957) (under Fourteenth Amendment "officers of a State cannot exclude an applicant [to the bar] when there is no basis for their finding that he fails to meet [permissible] standards"). Under these precedents and principles, a state official's deprivation of a parent's right in the custody of his or her children, premised on fabricated or wholly unsubstantiated grounds, violates a clearly established constitutional right.

Russell and Adams rely heavily on the Second Circuit's decision in *van Emrik v. Chemung County Dept. of Social Services*. That case involved a suit against child protective services caseworkers who had caused a suspected child abuse victim to be temporarily removed

from her parents' custody. 911 F.2d at 865. The court's discussion of the immunity defense is informative:

> Though a decision to remove a child from parental custody implicates the constitutional rights of the parents, it obliges protective services caseworkers to choose between difficult alternatives in the context of suspected child abuse. If they err in interrupting parental custody, they may be accused of infringing the parents' constitutional rights. If they err in not removing the child, they risk injury to the child and may be accused of infringing the child's rights. It is precisely the function of qualified immunity to protect state officials in choosing between such alternatives, *provided that there is an objectively reasonable basis for their decision,* whichever way they make it. Such a basis existed in this case. The defendants were confronted with an infant who had suffered a broken leg, characterized by an attending physician as "very suspicious" of child abuse. Quick inquiry of the people possibly responsible, the parents and the baby-sitter, failed to discover how the injury was sustained. The defendants consulted with superiors, obtained a court order, and executed it only after the parents refused to permit a temporary interruption of their custody. The issue is not whether it was absolutely essential to remove the child or whether a more sensitive course might have been to leave hospitalized pending further investigation. *The issue is whether it was objectively reasonable for the defendants to make the decision they made, and no rational jury could find that it was not.*

*Id.* at 866 (footnote omitted) (emphasis added).

On the undisputed facts of *van Emrik*, it was objectively reasonable for the state social workers to believe that their interference in family integrity was within constitutional bounds. *See also Cecere v. City of New York*, 967 F.2d 829 (child welfare supervisor entitled to qualified immunity where interference with parent's custody of child was supported by objectively reasonable belief that emergency existed). In the present case, by contrast, the relevant facts are disputed: the evidence submitted by the plaintiffs, if believed, tends to show no objectively reasonable basis for the decisions to substantiate and publish the charge of abuse against Wilkinson.

Plaintiffs have submitted evidence that Adams conducted an extraordinarily shoddy and unprofessional investigation of the report of child sexual abuse received from Wiegand and Balsam, that the record before him did not reasonably support the finding that Wilkinson had abused his sons, that Russell knew or should have known that the abuse finding was not reasonably supported, that both Adams and Russell ignored and concealed exculpatory evidence, and that both Adams and Russell substantiated and reported to others their finding (even after the substantiation was withdrawn by stipulation), knowing that the probable result would include the criminal prosecution of Wilkinson and his loss of custody over the children. Taking this evidence as true and drawing all justifiable inferences in favor of the plaintiffs, as required for summary judgment purposes, *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 255, the evidence is sufficient to prove it is more likely than not that Russell and Adams violated the clearly established constitutional rights of the plaintiffs to be free of the state's arbitrary interference

in their familial relationships, and further that it would not be objectively reasonable for the defendants to believe their conduct was within constitutional bounds. Accordingly, on this record, Russell and Adams are not entitled to summary judgment on the federal counts.

b. State Law Qualified Immunity

Resolution of the claim that Russell and Adams are entitled to summary judgment on the state law counts on qualified immunity grounds follows rather easily from the above discussion. Vermont law affords immunity from civil liability to state officials and employees: the state's highest executive officers receive absolute immunity when they are acting within their authority; lower-level state employees (like Adams and Russell) are entitled to qualified immunity when they are " '(1) acting during their employment and acting, or reasonably believing they are acting, within the scope of their authority; (2) acting in good faith; and (3) performing discretionary, as opposed to ministerial acts.' " *LaShay v. Dept. of Social and Rehabilitation Services*, 160 Vt. 60, 65 (1993) (quoting *Levinsky v. Diamond*, 151 Vt. 178, 185 (1989)).[2]

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[2] It may be noted that actions challenging official misconduct in Vermont typically must be brought against the state itself, pursuant to 12 V.S.A. § 5602(a), which provides:

> When the act or omission of an employee of the state acting within the scope of employment is believed to have caused damage to property, injury to persons, or death, the exclusive right of action shall lie against the state of Vermont; and no such action may be

"Good faith," the second element of the defense, is measured by the "objective test" expressly adopted from federal law as set forth in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). *Levinsky v. Diamond*, 151 Vt. 178, 190 (1989). Thus, as under federal qualified immunity,

> [g]ood faith exists where an official's acts did not violate clearly established rights of which the official reasonably should have known. This good faith inquiry does not ask whether plaintiffs rights were violated, but rather whether the official reasonably should have known that what she was doing violated plaintiff's rights.

*Murray v. White*, 155 Vt. 621, 630 (1991) (footnote and citation omitted). For purposes of state law qualified immunity, however, the "clearly established rights" need not be *federal* constitutional or statutory rights, as required in the application of the federal qualified immunity defense; to overcome the state law defense it is sufficient to show that the state employee's acts violated clearly established *state* law of which the employee reasonably should have known. *Id.* at 630 n.4. State law, of course, includes the common law of negligence. "Qualified immunity from tort liability will not be made to depend upon whether the tort has been codified." *Id.*

From the discussion in section 4(a) of this Opinion above, it follows a fortiori that there are material facts in

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maintained against the employee or the estate of the employee.

Section 5602(b), however, exempts "gross negligence or willful misconduct" from the above exclusivity rule. Plaintiffs allege, at least in part, that Adams and Russell were grossly negligent and willful, thus avoiding dismissal under § 5602(a).

dispute precluding summary judgment on qualified immunity grounds as to the plaintiffs' state tort law claims. Plaintiffs' evidence tends to show that the conduct of Russell and Adams was grossly negligent under state law and that it was not objectively reasonable for Russell and Adams to believe otherwise. *See LaShay,* 160 Vt. at 66-67 (SRS supervisor not entitled to summary judgment on qualified immunity grounds where evidence showed he neither reported nor investigated allegations that plaintiff's foster parent had previously requested sex with a minor).

Russell and Adams rely principally on *Murray v. White,* a decision of the Vermont Supreme Court holding that an SRS caseworker was entitled to summary judgment on qualified immunity grounds. 155 Vt. at 629. The case only underscores, however, why summary judgment is not appropriate in the present context.

The plaintiff in *Murray* was accused of molesting two neighborhood girls, ages seven and ten. *Id.* at 623. The defendant SRS caseworker interviewed the girls and their parents and prepared them for testifying against the plaintiff before the Parole Board. The Board later found insufficient evidence to support the charge. *Id.* at 624. In his suit, the plaintiff alleged that the caseworker's investigation was one-sided and insufficiently thorough, and that she had manipulated the interviews with the children in a biased and misleading way. *Id.* The trial court denied the caseworker's motion for summary judgment as to the plaintiff's state law claims. *Id.* at 624-25.

The Supreme Court reversed, holding that the plaintiff "failed to show that defendant should reasonably

have known that her acts violated plaintiff's rights." *Id.* at 630. In accordance with statutory requirements, the caseworker had immediately undertaken an investigation upon receiving the report of abuse, and the manner and extent of her investigation was consistent with the statute (33 V.S.A. § 4915) and the SRS policy manual. *Id.* at 631-32. The Court also noted it was "undisputed that both of the alleged victims in their statements indicated that they had been sexually molested by plaintiff." *Id.* at 632. Under the circumstances,

> [d]efendant should not have reasonably known that she was obligated to investigate any further than she did. In addition, defendant should not have reasonably known that the manner of her investigation violated plaintiff's rights.

*Id.*

These are essential points, which highlight where *Murray* diverges from the present case. Here, the powerful evidence of maternal coaching and attempts by Ben to recant the allegations (evidence apparently absent in *Murray*) make it at least a matter of dispute for resolution by a factfinder whether Adams should reasonably have known that he was obligated to investigate further than he did prior to substantiating the charge against Wilkinson. Similarly, the technical shortcomings evident in the transcribed interview with Ben create a factual issue whether Adams should reasonably have known that his investigation was so professionally deficient as to violate the plaintiffs' state law rights. These matters simply cannot be decided by summary judgment.

Russell's and Adams's motion for summary judgment (paper # 21) is accordingly DENIED.

5. Russell's and Adams's Motion for Summary Judgment with respect to Intentional Infliction of Emotional Distress

Russell and Adams brought this motion after receiving clarification as to Count VIII of the original complaint. They seek dismissal on the grounds that they are entitled to qualified immunity and that plaintiffs have failed to state a cause of action for intentional infliction of emotional distress. As to the former, summary judgment on the basis of qualified immunity is unwarranted on this record for the reasons set forth in the preceding section of this Opinion. As to the latter, plaintiffs have adequately alleged and supported the elements of this tort as explained above in section 3(d) of this Opinion.

The motion (paper # 41) is accordingly DENIED.

6. Plaintiffs' Motion for Summary Judgment

Plaintiffs have filed a motion for summary judgment in which they ask for rulings in their favor on the following issues: (1) that Balsam owed Wilkinson a duty of care as a matter of law; (2) that plaintiffs have properly set forth claims for which relief can be granted; and (3) that defendants are not immune, as a matter of law, from liability or suit. These are requests for *rulings* as to certain issues (all of which are discussed in preceding sections of this Opinion); they are not truly requests for *judgment* as contemplated by Rule 56.

Plaintiffs' motion (paper # 35) is accordingly DENIED.

7. Balsam's Motion for Sanctions

Balsam filed a motion for sanctions against Ben because he failed to appear for a scheduled deposition on July 14, 1994. In light of Wilkinson's representations that Wiegand has disappeared with Ben, the motion (paper # 39) is DENIED.

8. Russell's and Adams's Objections to Plaintiffs' Interrogatories and Requests to Produce

Objections were raised to plaintiffs' discovery requests served on or about July 14, 1994, on the ground that discovery should be stayed until the threshold immunity issue is resolved. Subsequently, on August 22, 1994, this court granted an application to enlarge the discovery period, ordering that the discovery schedule need not be filed pending disposition of the summary judgment motions. The objections (paper # 54) are moot in light of the August 22, 1994 order.

As all pending motions are resolved herein, and upon the filing of responsive pleadings by SRS and Jeffords, the parties are directed to file a joint discovery schedule in accordance with Local Rule No. 4.

## CONCLUSION

The following orders are hereby entered:

1. Plaintiffs' motion to join parties and to amend complaint (Paper 38) is GRANTED.

2. Defendants' motion for more definite statement (Paper 25) is DENIED.

3. Defendant Balsam's motion for summary judgment (Paper 5) is DENIED.

4. Defendants Russell's and Adams's motion for summary judgment (Paper 21) is DENIED.

5. Defendants Russell's and Adams's second motion for summary judgment (Paper 41) is DENIED.

6. Plaintiffs' motion for summary judgment (Paper 35) is DENIED.

7. Defendant's motion for sanctions (paper 39) is DENIED.

8. Defendants' objections to discovery requests (paper 54) are DENIED as moot.

Dated at Burlington, in the District of Vermont, this 14 day of April, 1995.

/s/ Fred I. Parker
Fred I. Parker, Chief Judge
Sitting By Designation

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

WILKINSON v. RUSSELL

*Use short title*

Each motion must be accompanied by a supporting affidavit (Local Rule 27(a)).

97-9073
*Docket Number*

**NOTICE OF MOTION**

*state type of motion*

for Rehearing

MOTION BY: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

Michael O. Duane
Assistant Attorney General
103 S. Main St. Ladd Hall
Waterbury, VT 05676 (802) 241-2821

Has consent of opposing counsel:

A. been sought? [ ] Yes [XX] No
B. been obtained? [ ] Yes [XX] No
Has service been effected? [XX] Yes [ ] No
Is oral argument desired? [ ] Yes [XX] No
(*Substantive motions only*)
Requested return date:
(*See Second Circuit Rule 27(b)*)
Has argument date of appeal been set:
A. by scheduling order? [ ] Yes [XX] No
B. by firm date of argument notice? [ ] Yes [XX] No
C. If Yes, enter date: _____

OPPOSING COUNSEL: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

Harold B. Stevens
P.O. Box 1200
Stowe, VT 05672
(802) 253-8547

**EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL**

Has request for relief been made below? [ ] Yes [ ] No
*(See F.R.A.P. Rule 8)*
Would expedited appeal eliminate need for this motion? [ ] Yes [ ] No
If No, explain why not:

Will the parties agree to maintain the status quo until the motion is heard? [ ] Yes [ ] No

Judge or agency whose order is being appealed:

Judge Sessions, (Judge Parker) US. District Court for the District of Vermont

Brief statement of the relief requested:

Appellants seek rehearing under F.R.A.P. 40 of the October 7, 1997 decision of this Court granting the appellees' motion to this dismiss this appeal.

Complete Page 2 of this Form

Appellant or Petitioner:
[ ] Plaintiff [XX] Defendant

Appellee or Respondent:
[ ] Plaintiff [ ] Defendant

By: (*Signature of attorney*) Appearing for: (*Name of party*)

Russell, Adams & Jeffords

/s/ _____
Signed name must be printed beneath

10/15/97
Date

Michael O. Duane, Ass't Atty. Gen. _____

**ORDER**

*Kindly leave this space blank*

**IT IS HEREBY ORDERED that the motion be and it hereby is denied**

**UNITED STATES COURT OF APPEALS**

**(Filed Oct. 28, 1997)**

**GEORGE LANGE III, CLERK SECOND CIRCUIT**

**FOR THE COURT: GEORGE LANGE III, Clerk**

**by: /s/ Beth J. Meador**
**Beth J. Meador, Administrative Attorney**

10/28/97
Date

**MANDATE**



United States Court of Appeals
FOR THE SECOND CIRCUIT

Each motion must be accompanied by a supporting affidavit (Local Rule 27(a)).

(Filed Jul. 10, 1995)

| | |
|---|---|
| Wilkinson, et al.<br>v. [SEAL]<br>Balsam, et al.<br>*use short title* | 95-7447<br>*Docket Number*<br>**NOTICE OF MOTION**<br>*state type of motion*<br>for dismissal of appeal |

MOTION BY: *(name address and tel. no. of law firm and attorney in charge of case)*

Harold B. Stevens, Esq
STEVENS LAW OFFICE
P.O. Box 1200
Stowe, Vermont 05672

| | |
|---|---|
| A. been sought? | [X] Yes [ ] No |
| B. been obtained? | [ ] Yes [X] No |
| Has service been effected? | [X] Yes [ ] No |
| Is oral argument desired? | [ ] Yes [X] No |
| *(Substantive motions only)* | |
| Requested return date: | |
| *(See Second Circuit Rule 27(b))* | |
| Has argument date of appeal been set: | |

A. by scheduling order? [ ] Yes [X] No
B. by firm date of argument notice? [ ] Yes [X] No
C. If Yes, enter date:

Judge or agency whose order is being appealed:
Fred I. Parker

Michael O. Duane, Esq.
Assistant Attorney General
103 South Main Street
Waterbury, Vermont
05671-0701

**EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL** N/A

Has request for relief been made below? [ ] Yes [ ] No
*(See F.R.A.P. Rule 8)*
Would expedited appeal eliminate need for this motion? [ ] Yes [ ] No
If No, explain why not:

Will the parties agree to maintain the status quo until the motion is heard? [ ] Yes [ ] No

Brief statement of the relief requested: Immediate dismissal of the Appeal

Complete Page 2 of this Form

By: *(Signature of attorney)*

/s/ Harold B. Stevens, Esq.
Signed name must be printed beneath
Harold B. Stevens, Esq.

Appearing for: *(Name of party)*
Thomas Wilkinson
Appellant or Petitioner:
[ ] Plaintiff [ ] Defendant
Appellee or Respondent:
[X]Plaintiff [ ] Defendant

Date
7/6/95

**ORDER**

[SEAL]

*Kindly leave this space blank*

**IT IS HEREBY ORDERED that the motion be and it hereby is granted**

**FOR THE COURT**
**GEORGE LANGE III, Clerk**
**By:**
/s/ Beth J. Meador
**Beth J. Meador**
**Administrative Attorney**
ISSUED AS MANDATE. 9/6/95

9/5/95
(Date)

A TRUE COPY
GEORGE LANGE III, CLERK

/s/ George Lange III

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

| | | |
|---|---|---|
| THOMAS WILKINSON and BENJAMIN WILKINSON, by and through his Father and Guardian, THOMAS WILKINSON, and JONATHAN WIEGAND by and through THOMAS WILKINSON his Legal Guardian, | ) | Civil Action File No. 2:94-CV-175 |
| Plaintiffs, | ) | NOTICE OF APPEAL |
| v. | ) | |
| CAROLINE S. RUSSELL, JAMES ADAMS, and GERALD JEFFORDS, | ) | |
| Defendants. | ) | |

Notice is hereby given that Caroline S. Russell, James Adams, and Gerald Jeffords, defendants in the above-named matter, hereby appeal to the United States Court of Appeals for the Second Circuit from the August 1, 1997 Opinion and Order of Judge William K. Sessions III denying defendants' claims of qualified immunity with respect to Counts II, V, VI and VIII, which is a final decision within the meaning of 28 U.S.C. § 1291 under the collateral order doctrine recognized in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and therefore is subject to immediate appeal. *See Behrens v. Pelletier*, ___ U.S. ___, 116 S.Ct. 834, 836 (1996); *Johnson v. Jones*, ___ U.S. ___, 115 S.Ct. 2151, 2155-56 (1995); *Mitchell v. Forsyth*, 472 U.S. 511, 524-30, 105 S.Ct. 2806, 2814-18 (1985).

DATED at Waterbury, Vermont this 22 day of August, 1997.

WILLIAM H. SORRELL
Vermont Attorney General
Attorney for Defendants
By: /s/ Michael O. Duane,
MICHAEL O. DUANE,
Assistant Attorney General
Federal I.D. No. 000405609

**United States Court of Appeals** **PAGE 1**
**FOR THE SECOND CIRCUIT**

**Each motion must be accompanied by a supporting affidavit (Local Rule 27(a)).**

| | |
|---|---|
| **Wilkinson, et al.**<br>**v.**<br>**RUSSELL, et al.**<br>*use short title* | 97-9073<br>*Docket Number*<br>**NOTICE OF MOTION**<br>*state type of motion*<br>for dismissal of appeal |

MOTION BY: *(name address and tel. no. of law firm and attorney in charge of case)*

Harold B. Stevens, Esquire
STEVENS LAW OFFICE
P.O. Box 1200
Stowe, VT 05672

As consent of opposing counsel:

| | |
|---|---|
| A. been sought? | [X] Yes [ ] No |
| B. been obtained? | [ ] Yes [X] No |
| Has service been effected? | [X] Yes [ ] No |
| Is oral argument desired? *(Substantive motions only)* | [ ] Yes [X] No |
| Requested return date: *(See Second Circuit Rule 27(b))* | |
| Has argument date of appeal been set: | |

A. by scheduling order? [ ] Yes [X] No
B. by firm date of argument notice? [ ] Yes [X] No
C. If Yes, enter date:

Judge or agency whose order is being appealed:
Judge Fred I. Parker

---

OPPOSING COUNSEL:
*(Name, address and tel. no. of law firm and of attorney in charge of case)*

Michael O. Duane, Esquire
Assistant Attorney General
103 So. Main Street
Waterbury, VT 05671-0701

**EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL** N/A

Has request for relief been made below? [ ] Yes [ ] No
*(See F.R.A.P. Rule 8)*
Would expedited appeal eliminate need for this motion?
If No, explain why not: [ ] Yes [ ] No

Will the parties agree to maintain the status quo until the motion is heard? [ ] Yes [ ] No

---

Brief statement of
the relief requested: Immediate dismissal of the Appeal

Complete Page 2 of this Form

By: *(Signature of attorney)*

/s/ Harold B. Stevens, Esquire
Signed name must be printed beneath
Harold B. Stevens, Esquire

Appearing for: *(Name of party)*
/s/ Thomas Wilkinson
Appellant or Petitioner:
[ ] Plaintiff [ ] Defendant
Appellee or Respondent:
[X]Plaintiff [ ] Defendant

Date
9/11/97

**ORDER**

*Kindly leave this space blank*

**IT IS HEREBY ORDERED that the motion be and it hereby is granted denied**

_____
_____
_____
Circuit Judge

_____
Date

Previous request for similar relief and disposition:

Whether or not the appeal is premature.

Statement of the issue(s) presented by this motion:

Defendants/Appellants are appealing from an order denying them summary judgment for qualified immunity for the second time in this case.

Brief statement of the facts *(with page references to the moving papers):*

Since relevant factual issues exist the appeal is premature and the Court lacks jurisdiction to entertain it. See prior dismissal in *Wilkinson, et al. v. Balsam, et al.* 2nd Circuit Court of Appeal, Docket No.: 95-7447 filed September 5, 1995.

Summary of the argument *(with page references to the moving papers):*

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**IN THE**
**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

| | | |
|---|---|---|
| THOMAS WILKINSON and BENJAMIN WILKINSON, by and through his father and guardian, Thomas Wilkinson | ) | |
| Plaintiffs-Appellees | ) | Docket No.: 97-9073 |
| v. | ) | |
| CAROLYN S. RUSSELL and JAMES ADAMS | ) | |
| Defendants-Appellants | ) | |

## MOTION TO DISMISS APPEAL

NOW COME plaintiffs-appellees, by and through their attorneys, Harold B. Stevens, Esquire, of Stevens Law Office and move to dismiss the above captioned appeal for the following reasons:

1. On May 2, 1995 defendants Russell and Adams, filed an immediate appeal from an Opinion and Order of Judge Fred I. Parker dated April 14, 1995 denying defendants motion for summary judgment for qualified immunity from suit. See Exhibit 1. *Wilkinson v. Balsam*, 885 F. Supp. 651 (D. Vt. 1995).

2. Judge Parker found at pages 661 and 664 of his Opinion and Order (Exhibit 1) that the relevant facts were disputed concerning defendants' claims of state and federal qualified immunity and denied their request for summary judgment.

3. Defendants' appeal from Judge Parker's decision was dismissed by the Second Circuit Court of Appeal on September 5, 1995 since there were genuine issues of fact involved concerning qualified immunity requiring a trial on these issues.

4. Plaintiffs amended their complaint to join social worker Gerald Jeffords as a defendant for the same claims as those made against Adams and Russell.

5. Jeffords was Adams' supervisor and substantiated the abuse charges based on Adams' shoddy interview and Russell was Jeffords' director.

6. On February 28, 1997 Adams, Jeffords and Russell again moved for summary judgment on the issue of federal and state qualified immunity along with certain other claims.

7. In an Opinion and Order of Judge Williams Sessions dated August 1, 1997, the District Court denied defendants' renewed motion for summary judgment on the issues of state and federal qualified immunity for the same reason as Judge Parker since there were the same genuine issues of fact in dispute concerning qualified immunity as there were previously. (See attached Opinion and Order (Exhibit 1)).

8. Defendants have now filed the present appeal from Judge Sessions' Opinion and Order on his denying their motion for summary judgment concerning qualified immunity.

9. Since the resolution of qualified immunity claims of the defendants again are based upon disputed factual issues or mixed questions of fact of law appellate review

must await resolution of the factual issues at trial, *Hill v. City of New York*, 45 F.3d 653, 660 (2nd Cir. 1995). *Weaver v. Brenner*, 40 F.3d 527, 533 (2nd Cir. 1994).

10. Plaintiff respectfully submit that this immediate appeal is premature and the Second Circuit Court of Appeals lacks jurisdiction to entertain the appeal so long as relevant factual issues are in dispute as found by the trial court. *Id.*

11. Plaintiffs expect defendants-appellants to object to this motion.

WHEREFORE, the plaintiffs request that the appeal be dismissed.

Dated at Stowe, Vermont, this 12 day of September, 1997.

PLAINTIFFS-APPELLEES:

BY: /s/ Harold B. Stevens
Harold B. Stevens, Esquire
STEVENS LAW OFFICE
Their Attorneys
Federal Bar I.D. #000425077

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

| | | |
|---|---|---|
| THOMAS WILKINSON, et al. | ) | |
| Plaintiffs, Appellees | ) | Docket No. 97-9073 |
| v. | ) | |
| CAROLYN S. RUSSELL, JAMES ADAMS And GERALD JEFFORDS | ) | |
| Defendants, Appellants | ) | |

**MEMORANDUM IN OPPOSITION TO APPELLEES' MOTION TO DISMISS APPEAL**

The appellants oppose the appellees' motion to dismiss this appeal. This Court has appellate jurisdiction to decide this appeal as the appeal involves an abstract issue of law relating to qualified immunity, and there are no genuine issues of material fact in dispute.

In its Opinion and Order entered on July 31, 1997 the District Court stated, "The Court has already ruled on the remaining counts", with regard to Count II (Negligence), Count V (Deprivation of Civil Rights), Count VI (Denial of Due Process), and Count VIII (Infliction of Emotional Distress) in apparent reference to the District Court's Opinion and Order of April 17, 1995. However, Count II (Negligence) and Count VI (Denial of Due Process) were new counts which the plaintiffs moved on July 26, 1994 to amend to their original complaint. Their motion to amend was not granted until April 17, 1995, and the defendants then filed their answer to these new counts on July 7,

1995 and on November 17, 1995. After extensive discovery the defendants filed their motion for summary judgment on February 28, 1997 through which Count II (Negligence) and Count VI (Denial of Due Process) were put before the District Court for the first time. Accordingly, Counts II and VI, as amended, had not been already ruled on by the District Court.

In addition, defendant Gerald Jeffords was likewise added as a defendant by the District Court's order of April 17, 1995, an answer to the amended complaint was filed on his behalf on July 7, 1995 and the motion for summary judgment also filed on his behalf on February 28, 1997 was the first time that any counts involving him, including Counts II, VI, and VIII had been heard by the Court. Accordingly, no counts involving defendant Jeffords had been already ruled on by the District Court.

Furthermore, in its earlier Opinion and Order of April 17, 1995 the District Court denied the motion for summary judgment by defendants Russell and Adams based on the plaintiffs' original complaint "on this record" (at page 27). Thereafter, extensive discovery was conducted and a new motion for summary judgment with new attachments based on plaintiffs' amended complaint was filed with the District Court for its consideration.

Pursuant to District of Vermont Local Rule 5(c)(A), now Rule 7.1(c), the defendants filed a separate, short and concise statement of undisputed material facts as to which it was contended that there existed no genuine issue to be tried. In their response the plaintiffs did not controvert the material facts regarding Count II. Likewise, the plaintiffs did not controvert the material facts

regarding Count V except to "object" to paragraph 2, but the plaintiffs did not controvert the material facts regarding Count II. Finally, the plaintiffs also did not controvert any of the material facts regarding Count VI, and merely "object" to the defendants' "characterization" of a witness' testimony. The plaintiffs did not contend that there were any material facts to which there existed a genuine issue to be tried, and they did not controvert any of the material facts contained in the defendants' statement which are accordingly deemed to be admitted below.

However, even accepting the facts as the District Court viewed them in its earlier Opinion and Order of April 17, 1995, and notwithstanding the plaintiffs' failure to dispute the defendants' contention that no genuine issue of material fact exists in this case, the Circuit Court of Appeals has jurisdiction over this matter. The appellants are not urging on appeal that there is insufficient evidence to raise a genuine issue of fact. Rather, the appellants are asserting that the defendants' conduct, no matter how it is viewed, did not violate clearly established law. Accordingly, this Court has jurisdiction under 28 U.S.C.A. Section 1291. *Behrens v. Pelletier*, ___ U.S. ___, ___, 116 S Ct. 834, 842, 133 L.Ed. 2d 773, 787-788 (1996); see also *Winfield v. Bass*, 106 F.3d 525, 528-530 (4th Cir. 1997) (citing *Johnson v. Jones*, ___ U.S. ___, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995); and see Cartier v. Lussier, 955 F.2d 841 (2nd Cir. 1992).

The decision of the District Court entered on July 31, 1997 denying the defendants' motion for summary judgment on Counts V and VI, which motion was based on Federal qualified immunity, as well as on the legal merits of the plaintiffs' Federal causes of action, was directly

contrary to this Court's decisions in *Robinson v. Via*, 821 F.2d 913 (2nd Cir. 1990); *Doe v. Conn. Dept. of Child and Youth Services*, 911 F.2d 868 (2nd Cir. 1990); *Chemung County Dept. of Soc. Serv.*, 911 F.2d 863 (2nd Cir. 1990); and *Gottlieb v. County of Orange*, 84 F.3d 511 (2nd Cir. 1996). In addition, the Court's decision denying summary judgment on Counts II and VIII, which motion was based on state qualified immunity, as well as the legal merits of the plaintiffs' state causes of action, was directly contrary to the Vermont Supreme Court's decision in *Murray v. White*, 155 Vt. 621, 587 A.2d 975 (1991).

In conclusion, as the appeal of the defendant-appellants raises only questions of law regarding whether the rights asserted by the plaintiffs were clearly established at the time the defendants' actions were taken this Court has jurisdiction over this appeal, and the appellees' motion to dismiss should be DENIED.

Dated at Waterbury, Vermont, this 26 day of September, 1997.

WILLIAM H. SORRELL
VERMONT ATTORNEY GENERAL
ATTORNEY FOR THE DEFENDANTS

By: /s/ Michael O. Duane
MICHAEL O. DUANE
ASSISTANT ATTORNEY GENERAL
Federal Bar I.D. No. 000405609

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

WILKINSON v. RUSSELL

*Use short title*

Each motion must be accompanied by a supporting affidavit (Local Rule 27(a)).

97-9073
*Docket Number*

**NOTICE OF MOTION**

*state type of motion*

for Rehearing

MOTION BY: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

Michael O. Duane
Assistant Attorney General
103 S. Main St. Ladd Hall
Waterbury, VT 05676 (802) 241-2821

Has consent of opposing counsel:

| | | |
|---|---|---|
| A. been sought? | [ ] Yes | [XX] No |
| B. been obtained? | [ ] Yes | [XX] No |
| Has service been effected? | [XX] Yes | [ ] No |
| Is oral argument desired? | [ ] Yes | [XX] No |
| *(Substantive motions only)* | | |
| Requested return date: | | |
| *(See Second Circuit Rule 27(b))* | | |
| Has argument date of appeal been set: | | |
| A. by scheduling order? | [ ] Yes | [XX] No |
| B. by firm date of argument notice? | [ ] Yes | [XX] No |
| C. If Yes, enter date: _____ | | |

OPPOSING COUNSEL: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

Harold B. Stevens
P.O. Box 1200
Stowe, VT 05672
(802) 253-8547

**EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL**

Has request for relief been made below? [ ] Yes [ ] No
*(See F.R.A.P. Rule 8)*
Would expedited appeal eliminate need for this motion? [ ] Yes [ ] No
If No, explain why not:

Will the parties agree to maintain the status quo until the motion is heard? [ ] Yes [ ] No

Judge or agency whose order is being appealed:

Judge Sessions, (Judge Parker) US. District Court for the District of Vermont

Brief statement of the relief requested:

Appellants seek rehearing under F.R.A.P. 40 of the October 7, 1997 decision of this Court granting the appellees' motion to this dismiss this appeal.

Complete Page 2 of this Form

Appellant or Petitioner:
[ ] Plaintiff [XX] Defendant

Appellee or Respondent:
[ ] Plaintiff [ ] Defendant

By: (*Signature of attorney*) Appearing for: (*Name of party*)

Russell, Adams & Jeffords

/s/ Illegible
Signed name must be printed beneath

10/15/97
Date

Michael O. Duane, Ass't Atty. Gen.

**ORDER**

*Kindly leave this space blank*

**IT IS HEREBY ORDERED** that the motion be and it hereby is granted denied

Date

Circuit Judge

Previous requests for similar relief and disposition:

The appellees' motion to dismiss this appeal was granted on October 7, 1997.

Statement of the issue(s) presented by this motion:

Whether this Court should rehear the appellees' motion to dismiss the appeal and deny the appellees' motion because this Court does have appellate jurisdiction under 28 U.S.A.s1291 for the purpose of reviewing the denial of summary judgment on the grounds of qualified immunity.

Brief statement of the facts (*with page references to the moving papers*):

On September 12, 1997 the appellees moved to dismiss this appeal claiming that the Court had no jurisdiction to hear it because factual issues still existed to be resolved. On September 26, 1997 the appellants responded by asserting that, even accepting the facts as the plaintiffs or the District Court viewed them, the only issue to be raised in this appeal is the legal question of whether the legal rights asserted by the plaintiff-appellees were "clearly established" for the purposes of asserting a qualified immunity defense.

Summary of the argument (*with page references to the moving papers*):

The appellants respectfully submit that this Court's decision of October 7, 1997 granting the appellees' motion to dismiss the appeal is contrary to this Court's decision in *Jemmott v. Coughlin*, 85 F.3d 61,66 (2nd Cir. 1996) and the Supreme Court's decision in *Behrens v. Pelletier*, ___ U.S. ___, 116 S.Ct. 834, 840-842, 133 L.Ed. 2d 773, 787-788 (1996).

As in *Jemmott* for purposes of this appeal the appellants are not contesting the sufficiency of the plaintiff-appellees' proof or any ruling of the District Court that there are factual disputes in this matter. The appellants are instead only asserting that even if the plaintiffs' allegations are accepted as true no "clearly established" federal rights were violated. Accordingly, this Court does have jurisdiction to hear the appellants' appeal of the

denial of summary judgment on qualified immunity grounds.

The District Court's denial of summary judgment to the social worker defendants in this case in contrary to this Court's decisions in *Robinson v. Via*, 821 F.2d 913 (2nd Cir.1990), *Doe v. Conn. Dept. of Child and Youth Services*, 911 F.2d 868 (2nd Cir. 1990), *van Emrik v. Chemung County Dept. of Social Serv.*, 911 F.2d 863 (2nd Cir. 1990) and *Gottlieb v. County of Orange*, 84 F.3d 863 (2nd Cir. 1996). Moreover, the District Cout's decision denying summary judgment based on qualified immunity to the social workers in this case is also contrary to the holdings in *Frazier v. Bailey*, 957 F. 2d 920 (1st Cir. 1993), *Doe v. State of Louisiana*, 2 F.3d 1412 (5th Cir. 1993), *Williams v. Pollard*, 44 F.3d 433 (6th Cir.1995), *Manzano v. South Dakota Dept. of Social Services*, 60 F.3d 505 (8th Cir. 1995) and *Foy v. Holston*, 94 F.3d 1528 (11th Cir. 1994).

For all the above-stated reasons the Court should grant the motion for a rehearing in this case and deny the appellees' motion to dismiss the appeal in a manner consistent with this Court's decision in *Jemmott* and the Supreme Court's decision in *Behrens*.

IN THE UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

| | | |
|---|---|---|
| WILKINSON et al. | ) | |
| Plaintiffs-Appellees | ) | |
| v. | ) | Docket No. 97-9073 |
| RUSSELL et al. | ) | |
| Defendants-Appellants | ) | |

**AFFIDAVIT**

NOW COMES Assistant Attorney General Michael O. Duane and states under oath that:

1. This motion is being made pursuant to F.R.A.P. 40 for a rehearing with regard to the appellees' motion to dismiss this appeal;

2. For purposes of this appeal, the defendant-appellants concede to the facts alleged by the plaintiff-appellees as asserted by them and as viewed by the District Court in its Opinion and Order of April 17, 1995 and relied upon by the District Court in its Opinion and Order of July 13, 1997 from which the present appeal is taken;

3. The Opinion and Order of April 17, 1995 and the Opinion and Order of July 31, 1997 were included as Exhibits I and II, respectively, in the appellees' motion to dismiss dated September 12, 1997;

4. This appeal is taken to only resolve an abstract issue of law relating to qualified immunity as to whether the rights allegedly infringed were clearly established.

Dated at Waterbury, Vermont this 15 day of October, 1997.

/s/ Michael O. Duane
Michael O. Duane
Assistant Attorney General

Subscribed and sworn to before me this 15 day of October, 1997.

/s/ Rachel Champney
Notary Public
My Commission Expires:
2/10/99

Supreme Court, U.S.
FILED
JAN 5 1998
CLERK

(2)

No. 97-987

In The

# Supreme Court of the United States

October Term, 1997

CAROLINE RUSSELL, JAMES ADAMS
AND GERALD JEFFORDS,

*Petitioners,*

v.

THOMAS WILKINSON, BENJAMIN WILKINSON
AND JONATHAN WEIGAND, MINORS,
BY AND THROUGH THEIR GUARDIAN,
THOMAS WILKINSON,

*Respondents.*

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

## RESPONDENTS' OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

HAROLD B. STEVENS, ESQUIRE
*Counsel of Record*
P.O. Box 1200
Stowe, Vermont 05672
802-253-8547
*Counsel for Respondents*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

6 pp

## PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceedings.

## STATEMENT OF FACTS

The facts of the case are set out in detail in the Appendix C of the Appendices to Petitioners' brief (App. 18-27). Petitioners are Vermont social workers, who in January 1992, negligently investigated and reported that Respondent, Thomas Wilkinson, had sexually abused his four year old son. Petitioners' substantiation led to Wilkinson's arrest and loss of custody of his child for a period of over four years. Respondents brought suit against Petitioners since 1) Petitioners never reported exculpatory evidence that the child had said he had made up the allegations; 2) Petitioners never contacted Respondent prior to substantiating the abuse; 3) Petitioners did not disclose that the child's mother had been accused of sexually abusing her nephew during their investigation; and 4) despite a written consent agreement to desubstantiate the abuse charges one of the Petitioners again resubstantiated abuse charges against Wilkinson to her Connecticut counterparts, without a prior hearing.

Petitioners have twice moved for summary judgment claiming they did not know they were violating Respondents' fundamental constitutional rights of family integrity or due process in substantiating and resubstantiating the abuse charges. Respondents submitted affidavits of Dr. Douglas Dennett, M.D., and Roger Kessler, a psychologist, in opposition to summary judgment. It was Dr. Dennett's opinion that Petitioners were grossly negligent and had no objective reasonable basis to substantiate abuse. Mr. Kessler stated that he had worked with Petitioners and that they were aware of a parent's constitutionally protected interest in the companionship of their children.

The District Court refused to grant Petitioners' motions for summary judgment finding the relevant facts were disputed as to whether or not Petitioners acted in an objectively reasonable manner and whether they should have known that they were violating Respondents' clearly established rights (App. 39, 43 and 44). Since there were genuine issues of fact in dispute the Second Circuit has twice dismissed Petitioners' intermediate appeals from the two summary judgment decisions.

## REASONS FOR NOT GRANTING THE WRIT OF CERTIORARI

### I.

**The Dismissals of Petitioners' Appeals Due to Genuine Issues of Fact Were Proper.**

Petitioners totally overlook that there is a genuine issue of fact as to whether or not they knew or should have known they were violating Respondents' constitutional rights of family integrity and/or due process of law. The Court has recognized in *Johnson v. Jones*, 515 U.S. ___, 115 S.Ct. 2151, 2156 (1995) that summary judgment decisions concerning qualified immunity which involve genuine issues of fact are not final orders and are not appealable. Therefore, the Court of Appeals, acted properly and according to law in dismissing the appeals since a genuine issue of fact was in dispute affecting the merits of the case.

## II.

**The Court of Appeal's and District Court's Decisions Are Not Contrary To The Decisions of Other Courts of Appeal and the Vermont Supreme Court.**

The federal law concerning the constitutional liberty interest to family integrity has been clearly established although definitions of the right have been developing to clarify when the right is violated. See App. 37-44. Here there was evidence before the District Court that Petitioners actually knew that parents have a constitutional right to be free of arbitrary state interference with the companionship of their children. Petitioners simply disputed the fact that they knew or should have known of the right to family integrity.

The District Court decision does not necessarily conflict with the Vermont Supreme Court decision in the case of *Billado v. Appel,* 657 A. 2d 84 (Vt. 1996). The reason being that the *Billado v. Appel* case involved negligent acts of Vermont social workers during the period of 1989 to 1990 while the case at hand involves social workers' acts in 1992 when they knew or should have known of the right to family integrity.

## CONCLUSION

The petition should not be granted since there is a genuine issue of fact concerning the issue of qualified immunity.

Respectfully submitted,

HAROLD B. STEVENS, ESQUIRE
*Attorney for Respondents*
P.O. Box 1200
Stowe, Vermont 05672
(802) 253-8547

Supreme Court, U.S.
FILED
JAN 27 1998
CLERK

No. 97-987

In The

# Supreme Court of the United States

October Term, 1997

CAROLINE RUSSELL, JAMES ADAMS
AND GERALD JEFFORDS,

*Petitioners,*

v.

THOMAS WILKINSON, AND BENJAMIN WILKINSON
AND JONATHAN WEIGAND, MINORS,
BY AND THROUGH THEIR GUARDIAN
THOMAS WILKINSON,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## PETITIONERS' SUPPLEMENTAL BRIEF AND APPENDIX

WILLIAM H. SORRELL
Vermont Attorney General

MICHAEL O. DUANE
Assistant Attorney General
*Counsel of Record*
Office of the Attorney General
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*Attorneys for Petitioners*
*Caroline Russell, James Adams*
*And Gerald Jeffords*

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25 pp

## SUPPLEMENTAL ARGUMENT

On January 7, 1998 the Court of Appeals for the Second Circuit issued an opinion in the case of *Tierney v. Davidson et al.*, No. 97-7172 (2nd Cir. Jan. 7, 1998) which involved an appeal by the defendants from the United States District Court for the District of Vermont's denial of qualified immunity on summary judgment. No petition for rehearing has been filed by the appellees in that case.

In *Tierney*, the appellees had argued that the Court of Appeals had no jurisdiction to entertain the defendants' interlocutory appeal. In response to the appellees' assertions the Second Circuit ruled, in reliance on *Salim v. Proulx*, 93 F.3d 86, 90-91 (2nd Cir. 1996), that it had jurisdiction to consider an interlocutory appeal when, as in the petitioners' present case, the defendants contend they are entitled to qualified immunity even under the plaintiffs' version of the facts, or even on the facts favorable to the plaintiff that the trial judge concluded the jury might find. (Supp. App. P. 8).

Furthermore, the Second Circuit in *Tierney* also ruled, in reliance on *Salem*, that "Only 'an interlocutory appeal in which a defendant contends that the district court committed an error of law in ruling that the plaintiff's evidence was sufficient to create a jury issue on the facts relevant to the defendant's immunity defense' is not permissible." (Supp. App. P. 9). As noted in their petition at page 6, the petitioners in the present case have repeatedly contended that they are *not* urging on appeal that there is insufficient evidence to raise a genuine issue of fact, and that their appeal only involves a purely legal question.

The Second Circuit's decision to dismiss the defendant-petitioners' appeal in the present case is in direct conflict with its recent decision in *Tierney*, and with the decisions of other Circuit Courts of Appeals. Accordingly, the petitioners respectfully request that their petition be granted so that they may be afforded their right to appeal the denial of their entitlement to the defense of qualified immunity to the Court of Appeals.

Respectfully submitted,

WILLIAM H. SORRELL
Vermont Attorney General

MICHAEL O. DUANE
Assistant Attorney General
*Counsel of Record*
Office of the Attorney General
103 South Main Street
Waterbury, Vermont 05671-0701
(802) 241-2821
*Attorneys for Petitioners*
*Caroline Russell, James Adams*
*And Gerald Jeffords*

**APPENDIX**

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 324 – August Term, 1997

(Argued: October 15, 1997 Decided: January 7, 1998)

Docket No. 97-7172

---------- x

MAUREEN TIERNEY, for herself and as mother of PHILIP T. NEWTON,

*Plaintiffs-Appelleees,*

PATRICK J. NEWTON,

*Plaintiff,*

- v. -

JOEL R. DAVIDSON; THOMAS E. WILLIAMS,

*Defendants-Appellants.*

STATE OF VERMONT,

*Defendant.*

---------- x

Before: JACOBS and LEVAL, *Circuit Judges,* and RESTANI, *Judge*.*

Appeal from a decision of the United States District Court for the District of Vermont (Murtha, Ch.J.), denying

---

* Hon. Jane A. Restani, of the United States Court of International Trade, sitting by designation.

police officers' motion for summary judgment dismissing section 1983 claim on qualified immunity grounds.

Vacated and remanded.

Timothy B. Tomasi, Assistant Attorney General, Montpelier, VT (William E. Griffin, Chief Assistant Attorney General, Office of the Attorney General, on the brief), *for Defendants-Appellants.*

Alicia Aiken, Rutland, VT (Herbert G. Ogden, Jr., Liccardi Crawford & Ogden, P.C., on the brief), *for Plaintiffs-Appellees.*

JACOBS, Circuit Judge:

Officers Joel Davidson and Thomas Williams of the Vermont State Police (the "Officers") responded separately to a report of a raucous domestic dispute at Maureen Tierney's home. Tierney, suing on behalf of herself and her son, Philip Newton, claims that the Officers conducted an unlawful search of her premises and used excessive force against her and her son on that occasion. The Officers now appeal the decision of the United States District Court for the District of Vermont (Murtha, Ch. J.), denying their motion for summary judgment on qualified immunity grounds. We vacate the district court's order and remand for entry of summary judgment in favor of the Officers on plaintiffs' federal claims because: (i) the district court erred in concluding that a genuine dispute existed as to material facts; (ii) the district court erred in according preclusive effect to a state court's suppression

ruling; and (iii) it was objectively reasonable for the Officers to believe that their actions did not violate clearly established law. In addition, having dismissed the federal claims, we dismiss the state claims for lack of jurisdiction.

## BACKGROUND

The facts, viewed on this motion for summary judgment in the light most favorable to plaintiffs, are as follows:

On September 21, 1992, Officer Davidson was dispatched to a residence on Little Rutland Road in Castleton, Vermont. The dispatcher told Davidson that she had received a call from an unnamed woman who reported that a "bad" domestic dispute was in progress, that there had been previous domestic disturbances at the same house, and that this episode was the worst yet. As Davidson drove down Little Rutland Road, he saw two men on the road, and approached them. One of them said that his wife had called the police. They pointed to a residence and told Davidson that it had been the scene of prior domestic altercations, that this was the worst yet, and that they had heard screaming and banging up until Davidson's approach.[1] Tierney's residence was quiet as Davidson walked up to it. According to Davidson, the silence suggested to him that someone in the house might be injured, and the fact that the dispute had just ended

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[1] Tierney claims that any information imparted by the anonymous caller and by these two men is hearsay and inadmissible. However, these statements are not being offered for their truth, but for their effect on Davidson's state of mind.

suggested to him that both parties to the fight were still present.

Behind a screen door, the door to Tierney's residence was closed and locked, with a broken glass pane through which a hand could reach. The door led onto a landing from which a stairway descended.

Davidson opened the door through the broken pane, and entered the house without knocking or identifying himself.[2] Tierney then appeared at the bottom of the stairs with her two children. Davidson told her he had received a noise complaint and asked her about the dispute. Tierney said nothing had happened, there was no problem, and asked him to leave. Tierney's face was red and she seemed upset and shaken. Davidson headed down the stairs. Tierney then told him to "get the fuck out." Davidson asked her if there was anyone else in the house, and she said no. Davidson asked her whom she had argued with; Tierney told him "it was none of his business," but then added that the person had left the house. Again Davidson asked who had been arguing with her; again Tierney denied any argument; again Tierney told Davidson to "get the fuck out." Davidson persisted and Tierney now responded that the other person had gone. Davidson warned Tierney that he feared for the safety of the children and told her that they could be placed with Social and Rehabilitative Services if they remained in danger.

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[2] Solely for the purposes of their motion for summary judgment, defendants conceded that the inner door was closed and locked, that Davidson opened the door through the window pane, and that Davidson did not knock and identify himself.

At that point in the conversation, Davidson surveyed the visible areas of the house and moved towards the children's bedroom. Tierney stepped in front of him to block the bedroom doorway; Davidson grabbed her wrist in a firm grip, and moved her backward through the doorway into the bedroom, letting go after about ten seconds without hurting her. In the children's bedroom, Davidson looked under the beds. Again Davidson warned that the children would be removed if they were in danger, and held Philip's wrist for five seconds without hurting him.

Meanwhile, Williams arrived at the house and learned from a bystander that Davidson was inside. Williams found the door open, and could hear Tierney and Davidson yelling. He then entered the house to provide backup.

After Williams reached the bottom of the stairs, a man grabbed him by the shoulder and loudly told him to leave. This was Patrick Newton, Tierney's boyfriend and the father of her children. The Officers, perceiving that Williams was being assaulted and fearing that Newton might gain control of his service revolver, jumped on Newton to subdue him. Williams tried to wrestle Newton to the ground. Tierney claims that the Officers delivered six or seven punches to Newton's head. As Williams was pinning Newton on the floor, Tierney tried to pull Williams off and tackle him. In response, Williams struck Tierney on the forearm with his nightstick. The Officers

eventually pepper-sprayed Newton, subdued him, handcuffed him, and led him from the house.[3]

As the Officers removed Newton, Tierney attempted to follow them out of the house, but Davidson grabbed her arm and threatened to remove the children if she did not stop interfering. After Newton was placed in the police car, Tierney saw Davidson speaking with a man she had never seen, who was inside her doorway, one step down from the landing. Tierney told the man to leave; Davidson told her that the man on the step was his informant; and several seconds later, both men left the house.

Newton was later charged with impeding an officer during an investigation of an alleged domestic assault, but the Vermont District Court granted Newton's motion to suppress and dismissed the case. The state court found that even if the statements of the neighbors and the suddenly silent premises could lead police reasonably to believe that an emergency existed when they entered the premises, the Officers had little evidence after entry to support a reasonable conclusion that an emergency continued to exist. There was no overturned furniture, no blood, no dangerous weapon, no hysterical victim, no noise; the putative victim told Davidson that the other party had left, and asked Davidson to leave as well. The state court ruled that the Officers' continued search of the premises exceeded the scope of a permissible search

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[3] Patrick Newton was originally a plaintiff, but his action was dismissed in February 1996 on consent of the parties.

because "insufficient circumstances existed for a reasonable person, without further information, to conclude that an emergency still existed or that anyone inside was still in need of assistance at that point." The state's attorney did not appeal.

Plaintiffs now assert claims pursuant to 42 U.S.C. § 1983, and the Vermont constitution and common law.[4] After completion of discovery, the Officers moved for summary judgment, asserting immunity from suit even under Tierney's version of the facts. The district court denied the motion, ruling that the state court suppression decision "precludes a finding that the defendants are entitled to a qualified immunity defense as a matter of law." The court continued:

> Here . . . there exists a genuine factual dispute as to whether the defendants entered a closed door upon initial entry into plaintiff's home. There are also factual disputes regarding the reasonableness of the defendants' asserted belief in "exigent circumstances" and, assuming the initial existence of exigent circumstances, whether and when the defendants exceeded the permissible scope of their limited privilege to be in plaintiff's home. Accordingly, on the instant record, the Court cannot conclude the defendants did not violate clearly established law, nor can it find the defendants' actions were objectively reasonable.

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[4] The claims against the State of Vermont were dismissed in July 1996.

## DISCUSSION

### I

We consider at the outset plaintiffs' argument that we lack jurisdiction to entertain this interlocutory appeal. Generally, "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S. Ct. 2806, 2817 (1985). We have held that an interlocutory appeal is available

> to challenge the trial judge's rejection of the immunity defense where the defendant contends that on stipulated facts, or on the facts that the plaintiff alleges are true, or on the facts favorable to the plaintiff that the trial judge concluded the jury might find, the immunity defense is established as a matter of law because those facts show either that he "didn't do it" or that it was objectively reasonable for him to believe that his action did not violate clearly established law.

*Salim v. Proulx*, 93 F.3d 86, 90-91 (2d Cir. 1996). Even where the lower court rules that material disputes of fact preclude summary judgment on qualified immunity, we may still exercise interlocutory jurisdiction if the defendant contests the existence of a dispute or the materiality thereof, or (what may be the same thing) contends that he is entitled to qualified immunity even under plaintiff's version of the facts. *See Salim*, 93 F.3d at 91; *see also Martinez v. City of Schenectady*, 115 F.3d 111, 114 (2d Cir. 1997) ("Simply declaring that genuine issues of fact exist

is not sufficient, in and of itself, to prevent an appeal."). Only "an interlocutory appeal in which a defendant contends that the district court committed an error of law in ruling that the plaintiff's evidence was sufficient to create a jury issue on the facts relevant to the defendant's immunity defense" is not permissible. *Salim*, 93 F.3d at 91.

We have jurisdiction to consider this appeal. Defendants here contend that even according to plaintiffs' version of the facts, they are entitled to summary judgment. Moreover, contrary to the district court's decision, no disputed fact is material to the resolution of defendants' qualified immunity motion. The district court cited the parties' dispute as to whether the door was open or closed when the police entered. However, defendants conceded – for the purposes of their summary judgment motion – that the door was closed. The two remaining issues identified by the district court as material facts in dispute amount to the ultimate contested issue of whether it was objectively reasonable for the Officers to believe that their actions were legal; but we have held that when the facts that bear on the circumstances are not in dispute, the issue of whether the defendants acted reasonably should be determined by the court on a motion for summary judgment. *See Lennon v. Miller*, 66 F.3d 416, 422 (2d Cir. 1995) ("However, in the absence of a material factual dispute, the question of whether it was objectively reasonable for the officers to believe that they did not violate the plaintiff's rights is a purely legal determination for the court to make."); *Warren v. Dwyer*, 906 F.2d 70, 76 (2d Cir. 1990) ("The better rule, we believe, is for the court to decide the issue of qualified immunity as a matter of law, preferably on a pretrial motion for

summary judgment when possible. . . . "); *see also Hunter v. Bryant*, 502 U.S. 224, 227, 112 S. Ct. 534, 536 (1991) ("[W]e repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation.").[5]

Because there are no material disputes of fact for the purposes of the summary judgment motion, and because the Officers claim that their actions were protected by qualified immunity, we have jurisdiction to determine on appeal whether defendants' qualified immunity defense has merit.

The Officers also challenge on appeal the district court's ruling that the state court's suppression decision has some preclusive effect in this case. This is a purely legal question that may have influenced the district court's qualified immunity ruling; accordingly, we have jurisdiction to consider this issue on an interlocutory appeal. *See Golino v. City of New Haven*, 950 F.2d 864, 868 (2d Cir. 1991).

## II

The district court attached some preclusive effect to the state court's suppression ruling in Newton's criminal case. Because the parties had insufficiently briefed the

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[5] Tierney argues that under *Oliveira v. Mayer*, 23 F.3d 642, 649 (2d Cir. 1994), the qualified immunity determination is for the jury. However, that case is distinguishable because the Court pointed to several material facts which were in dispute and which precluded determination of the qualified immunity issue before trial. *Id.* at 650.

issue, the district court was "unprepared to definitively declare [that State] Judge McCaffrey's findings preclude further litigation of any issue before this Court," but the court did hold that Judge McCaffrey's ruling, and its "factual finding of no exigent circumstances, is entitled to deference and precludes a finding that the defendants are entitled to a qualified immunity defense as a matter of law." Defendants claim that the district court erred in attaching any preclusive effect to the state ruling. We agree.

A party's ability to relitigate an issue decided in a prior state court litigation depends on the law of the state in which the earlier litigation occurred. 28 U.S.C. § 1738; *Migra v. Warren City School Dist. Bd. of Ed.*, 465 U.S. 75, 81, 104 S. Ct. 892, 896 (1984). Under Vermont law, issue preclusion applies when:

> (1) preclusion is asserted against one who was a party or in privity with a party in the earlier action; (2) the issue was resolved by a final judgment on the merits; (3) the issue is the same as the one raised in the later action; (4) there was a full and fair opportunity to litigate the issue in the earlier action; and (5) applying preclusion in the later action is fair.

*Trepanier v. Getting Organized, Inc.*, 583 A.2d 583, 587 (Vt. 1990). Several of these requirements are unsatisfied here.

First, the Officers were not parties to the state criminal action against Newton; nor are they in privity with the State of Vermont. *See Lamb v. Geovjian*, 683 A.2d 731, 735 (Vt. 1996) ("[A] public official sued in her individual capacity is generally not considered to be in privity with the government for the purpose of res judicata."); *see also*

*Kraushaar v. Flanigan*, 45 F.3d 1040, 1050-51 (7th Cir. 1995) (dismissal of criminal charges against plaintiff for lack of probable cause did not preclude relitigation of probable cause issue by defendant police officials in wrongful arrest action); *Davis v. Eide*, 439 F.2d 1077, 1078 (9th Cir. 1971) (per curiam) (adverse rulings in criminal action did not preclude defendant police officers from litigating lawfulness of search in civil action); 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4458, at 508 (1981) ("[A] judgment against a government does not bind its officials in subsequent litigation that asserts a personal liability against the officials.").

Second, the issue presented in the state suppression hearing was not identical to the issue presented here. The state court decided that the continuation of the search after the initial entry was unlawful because it was no longer reasonable for the Officers to believe that there was an emergency justifying the search. The state court did not resolve the constitutionality of the initial entry or the use of force against Tierney or Philip Newton. In addition, although the state court determined that it was illegal to continue the search in the absence of signs of wreckage or gore, the state court did not say whether it was *objectively reasonable* for the Officers to believe that what they did was legal. *See Lennon*, 66 F.3d at 424 (noting that state court suppression decision did not decide objective reasonableness issue). A further important distinction is that the burden in the state action was on the state to prove that an exception to the warrant requirement applied, whereas here the burden is on Tierney to

establish that the search was unlawful. *Ruggiero v. Krzeminski*, 928 F.2d 558, 563 (2d Cir. 991).

Third, the Officers did not have a full and fair opportunity to litigate in the state court because they were not parties to that action and there is no evidence of their participation in or control over those proceedings.

Accordingly, it was improper for the district court to attach *any* preclusive effect to the state court decision, and the district court erred in stating that the decision precluded judgment for the Officers as a matter of law.

## III

We review the district court's denial of summary judgment *de novo*. *Maxwell v. City of New York*, 102 F.3d 664, 667 (2d Cir. 1996), *cert. denied sub nom. Maxwell v. Bratton*, 118 S. Ct. 57 (1997). "A qualified immunity defense is established if (a) the defendant's action did not violate clearly established law, or (b) it was objectively reasonable for the defendant to believe that his action did not violate such law." *Salim*, 93 F.3d at 89 (citations omitted). "The objective reasonableness test is met if 'officers of reasonable competence could disagree' on the legality of the defendant's actions." *Id.* at 91 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)); *see also Lennon*, 66 F.3d at 421 (holding that summary judgment on a qualified immunity defense is appropriate "if the court determines that the only conclusion a rational jury could reach is that reasonable officers would disagree about the legality of the defendants' conduct under the circumstances").

"[Q]ualified immunity serves to protect police from liability and suit when they are required to make on-the-spot judgments in tense circumstances." *Id.* at 424.

**A. Davidson's Entry into Plaintiffs' House**

Plaintiffs claim that Davidson violated the Fourth Amendment when he entered Tierney's house without a warrant.[6] The Officers counter (i) that Davidson's entry into Tierney's house was lawful because it fell within the "exigent circumstances" or "emergency aid" exception to the warrant requirement, or (ii) at a minimum, it was objectively reasonable for Davidson to have believed that the search was legal under this exception.

Warrantless searches inside a home are presumptively unreasonable. *Payton v. New York*, 445 U.S. 573, 586, 100 S. Ct. 1371, 1380 (1980). However, "[p]olice officers may enter a dwelling without a warrant to render emergency aid and assistance to a person whom they reasonably believe to be in distress and in need of that assistance." *Root v. Gauper*, 438 F.2d 361, 364 (8th Cir. 1971); *see also Minnesota v. Olson*, 495 U.S. 91, 100, 110 S. Ct. 1684, 1690 (1990); *United States v. MacDonald*, 916 F.2d 766, 770 (2d Cir. 1990) (in banc); *United States v. Gallo-Roman*, 816 F.2d 76, 79 (2d Cir. 1987). Courts must apply an objective standard to determine the reasonableness of the officer's belief. *See Mincey v. Arizona*, 437 U.S. 385, 392, 98 S. Ct. 2408, 2413 (1978) ("Numerous state and

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[6] Plaintiffs do not dispute that Williams' entry into the house was protected by qualified immunity.

federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid."). However, "[t]his probable cause requirement[ ] must be applied by reference to the circumstances then confronting the officer, including the need for a prompt assessment of sometimes ambiguous information concerning potentially serious consequences." 3 Wayne LaFave, *Search and Seizure* § 6.6(a), at 391 (3d ed. 1996).

Courts have recognized the combustible nature of domestic disputes, and have accorded great latitude to an officer's belief that warrantless entry was justified by exigent circumstances when the officer had substantial reason to believe that one of the parties to the dispute was in danger. For example, in *Magnuson v. Cassarella,* 813 F. Supp. 1321 (N.D. Ill. 1992), police were called to the scene of a domestic disturbance by a neighbor who heard screams and was concerned about the infant in the house. *Id.* at 1322. When the police arrived outside the house, the neighbor reported – and the officer could hear – the screaming. The court found that the unannounced, warrantless entry into the house was justified by exigent circumstances:

> [The officer] arrived at the . . . home in response to a call from a neighbor who reported a domestic disturbance in progress. [The officer] himself heard screams coming from the . . . home, and was informed at the scene by the neighbor that an infant was involved. There is no question that a reasonable police officer faced with the situation encountered by [this officer] would believe that entry into the home was necessary

> to protect the safety of others. Indeed, as noted by [the officer] "[t]his type of situation has the possibility of an explosive and sudden eruption of violence". . . .

*Id.* at 1323.

Similarly, the police in *State v. Applegate*, 626 N.E.2d 942 (Ohio 1994), arriving at the scene in response to a "priority" domestic violence call, "heard noises indicating that violent activity was occurring inside." *Id.* at 944. The court held that their subsequent entry was justified by exigent circumstances. *Id.; see also State v. Greene*, 784 P.2d 257, 259 (Az. 1989) (en banc) ("These calls commonly involve dangerous situations in which the possibility for physical harm or damage escalates rapidly. . . . The call itself creates a sufficient indication that an exigency exists allowing the officer to enter a dwelling if no circumstance indicates that entry is unnecessary.").

Here, there is little doubt that it was reasonable for Davidson to believe that the search was justified by exigent circumstances. Davidson had been trained to treat these calls as "priority" and to expect violence in many such disputes. He was responding to what he was told was a "bad" domestic disturbance, the worst yet at this location according to experienced observers; when he arrived at the scene, he was informed by neighbors that the shouting had ended right before his arrival; and as he approached the house, Davidson heard nothing and found a broken window pane. It was reasonable for Davidson to believe that someone inside had been injured or was in danger, that both antagonists remained in the

house, and that this situation satisfied the exigent circumstances exception. Accordingly, Davidson is immune from suit for any claims arising from his entry.

**B. Davidson's Continued Presence and Search of the House**

Tierney also claims that Davidson's continued presence in the house and his search of the children's bedroom violated the Fourth Amendment. The Officers argue that Davidson's search was justified and reasonable, because (*inter alia*) once Davidson discovered Tierney and confirmed that there had been a domestic dispute, it was imperative that he find the other participant in the disturbance to ensure that Tierney and the children were no longer in danger and that the emergency had passed.

"[A] warrantless search must be strictly circumscribed by the exigencies which justify its initiation." Mincey, 437 U.S. at 393, 98 S. Ct. at 2413 (internal quotation marks omitted). As one commentator has noted:

> As to what may be done by the police or other public authorities once they are inside the premises, this must be assessed upon a case-by-case basis, taking into account the type of emergency which appeared to be present. . . . The officer's post-entry conduct must be carefully limited to achieving the objective which justified the entry – the officer may do no more than is reasonably necessary to ascertain whether someone is in need of assistance and to provide that assistance.

3 LaFave, *supra*, § 6.6(a), at 400-01. For example, in *United States v. Barone*, 330 F.2d 543, 545 (2d Cir. 1964), the

invasion of a bathroom in the course of a warrantless search triggered by screams coming from the apartment was justified when the officers were unable to ascertain the reason for the screams solely from their survey of the living room. *Id.; cf. Maryland v. Buie*, 494 U.S. 325, 337, 110 S. Ct. 1093, 1099-1100, (1990) ("The Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene.").

Here, domestic violence training warned Davidson about the inherent sensitivity and volatility of this situation. He entered the house for the purpose of ensuring that none of the occupants was in need of medical aid or protection. Tierney's response did not allay his well-founded concern that she or the children were in danger; her face was red, and she appeared shaken. Further cause for Davidson's concern was Tierney's false denial that any altercation had taken place. Tierney's deposition reflects that she first told Davidson that there was no problem or dispute; she then changed her story and stated that the identity of the other person involved in the dispute was "none of [Davidson's] business" and that the person had left. It was perfectly reasonable for Davidson to conclude that there had been a serious domestic dispute, that the other participant in the dispute was still on the premises and waiting in another room for the police to leave, and that Tierney and the children were intimidated and in danger. Nor was Davidson required to rule out the contingency that the other participant was pointing a gun at Tierney from another location or that

Tierney was the aggressor and that she had hidden her victim in another room. The logical means to defuse the situation was to find the other person and ensure that he or she presented or was in no further danger. Maybe some reasonable officers would have disregarded these dangers; fortunately, other reasonable officers show more initiative.

Tierney argues, frivolously, that Davidson was required to believe her statements that no dispute had occurred and leave the house. Tierney's denials contradicted the independent reports of a dispute; and her statements to Davidson were self-contradictory, so that it was clear she was lying. *See United States v. Bartelho*, 71 F.3d 436, 442 (1st Cir. 1995) ("[T]he police were not required to take [the victim's] statements at face value, given her demeanor, their training regarding domestic violence, and [the neighbor's] report."); *Magnuson*, 813 F. Supp. at 1324 ("[E]xigent circumstances do not end merely because the victim indicates that she is no longer in danger. That is a determination for the officer to make independently in light of the totality of the circumstances."). Nor did the absence of blood, overturned furniture or other signs of tumult render Davidson's belief that danger existed unreasonable. Davidson was not required to withdraw and go about other business, or stand watch outside the premises listening for the sounds of splintering furniture.

Indeed, it may have been a dereliction of duty for Davidson to have left the premises without ensuring that any danger had passed. *See Barone*, 330 F.2d at 545. And Davidson could not tell that the danger had passed unless he found the other participant in the dispute. *See*

*State v. Raines*, 778 P.2d 538, 542-43 (Wash. App. 1989) ("[T]he fact that the occupants appeared to be unharmed when the officers entered did not guarantee that the disturbance had cooled to the point where their continued safety was assured. Until they had an opportunity to observe [the boyfriend] and talk to him, they had no knowledge of his condition and state of mind."). Vermont State Police policy requires that officers responding to a domestic dispute "ensure that the scene is no longer violent[,] assess the need for medical attention," and "interview all parties separately."

It was objectively reasonable for Davidson to believe that a limited search of the premises to locate the other person involved in the dispute was necessary to ensure the safety of the people on the premises (including Tierney's two young children), and therefore lawful under the circumstances. Accordingly, Davidson is immune from suit for his continued presence in, and search of, the premises.

**C. Authorized Entry of a Third Party Onto Premises**

Plaintiffs claim that the Officers are liable for authorizing a third party to enter the premises, or failing to remove him at Tierney's request. However, it was reasonable for Davidson to believe that his actions were lawful; Davidson had just made an arrest and the house was now a crime scene; the third party, whom Davidson identified as an informant, was just inside the premises; any intrusion into the house was minimal; and Tierney concedes

that they left the house seconds after she objected. Davidson's actions in connection with the presence of this third party are protected by qualified immunity.

## D. Use of Excessive Force against Tierney and Philip Newton

Plaintiffs also claim that the Officers used excessive force: (i) when Davidson grabbed Tierney's arm to move her out of the doorway to the children's bedroom; (ii) when Davidson grabbed Philip Newton's arm; (iii) when Williams hit Tierney with a nightstick after she joined the struggle with Patrick Newton; and (iv) when Davidson grabbed Tierney's arm to stop her from following Patrick Newton outside.[7] However, the Officers are entitled to qualified immunity on these claims as well.

Plaintiffs do not assert that they were arrested or seized, and therefore these claims fall outside the Fourth Amendment protections applied in *Graham v. Connor*, 490 U.S. 386, 394-95, 109 S. Ct. 1865, 1871 (1989), and are governed instead by the Due Process Clause of the Fourteenth Amendment. Under *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973), a four-part test is employed to determine whether force is excessive under the Fourteenth Amendment, *i.e.*, whether it "shocks the conscience." *See Rahman v. Philip*, No. 92 Civ. 5349, 1995 WL 679251, at *4

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[7] Plaintiffs assert an emotional distress claim based upon force used against Patrick Newton, but such a claim would give rise only to a common law tort, not to a constitutional violation. See Grandstaff v. City of Borger, 767 F.2d 161, 172-73 (5th Cir. 1985).

(S.D.N.Y. Nov. 15, 1995) (applying *Johnson* test to excessive force claim under Due Process Clause), *aff'd*, 104 F.3d 356 (2d Cir. 1996) (summary order), *cert. denied*, 117 S. Ct. 2438 (1997). Those factors are: "[1] the need for the application of force, [2] the relationship between the need and the amount of force that was used, [3] the extent of injury inflicted, and [4] whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Johnson*, 481 F.2d at 1033. The Officers' use of force as to Tierney and Philip Newton was de minimis, necessary, appropriate, and benign.

## CONCLUSION

Accordingly, we vacate the district court's order denying summary judgment to defendants and remand for entry of summary judgment in favor of defendants on plaintiffs' federal claims. Since the federal claims must be dismissed, we also direct dismissal of the state claims for lack of jurisdiction. *See, e.g., Salim v. Proulx*, 93 F.3d 86, 92 (2d Cir. 1996); *Lennon v. Miller*, 66 F.3d 416, 426 (2d Cir. 1995).